Miscellaneous Topics

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A. Boards, Committees, and Commissions

1. Introduction

In addition to the "regular" departments and agencies that tend to attract the most attention, the federal government at any given time includes—although not in a formal, structural sense—a large number of miscellaneous bodies designated boards, committees, commissions, and various similar names. So pervasive are these miscellaneous bodies that they have been informally called the "Fifth Branch of Government."[1] This section will address funding aspects of these entities.

It is always helpful at the outset to define your universe. In this instance, however, we have been unable to discover or devise a satisfactory definition. As we will see later, the Federal Advisory Committee Act defines "advisory committee" for purposes of that statute, but advisory committees are only one type of these miscellaneous bodies, albeit the largest. The impossibility of crafting a useful definition becomes apparent upon considering the key elements of function, creation, membership, and duration:

- Function: Most of the bodies we are talking about are purely advisory. Some, however, are operational, and others have elements of both. Functions include, for example, such things as the investigation of specific incidents, claims adjudication, and the commemoration of historic persons or events.
- Creation: Advisory bodies can be created by Congress, the President, or a department head. Bodies that are not purely advisory may or may not require specific legislation, depending on their exact nature and functions.
- Membership: The entity may consist entirely of government officers or employees, entirely of nongovernment parties, or some of each.

[1] E.g., House Committee on Government Operations, The Role and Effectiveness of Federal Advisory Committees, H.R. Rep. No. 91-1731, at 4-5 (1970). The independent regulatory agencies—which also tend to be called "commissions"—comprise the Fourth Branch. Id.

- Duration: Some are temporary; some are indefinite; some are permanent. Some start out as temporary and, in effect, achieve immortality.[2]

One of the earliest instances of the use of presidential commissions—if not purely advisory ones—occurred in 1794, when George Washington named a commission to investigate the Whiskey Rebellion in Pennsylvania.[3] Although the explosive growth of these miscellaneous bodies did not occur until the 20th century, they were sufficiently common in 1842 to prompt Henry Clay to observe that the practice "had grown into use long since in the Executive Department."[4]

No one knows exactly how many miscellaneous boards, committees, and commissions exist at any given time. The only statistics available are for advisory committees subject to the Federal Advisory Committee Act (FACA), certainly the largest single category, and for these there is a clear downward trend as they are a favorite target of cost-cutters. When Congress was considering the FACA, the House Government Operations Committee reported that "there are at least 2,600 interagency and advisory committees and possibly as many as 3,200 presently existing," the uncertainty being that "many agencies are unable to supply a list of all their advisory bodies." H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3492. By the end of fiscal year 1992, there were 1,236 federal advisory committees. General Services Administration, Twenty-Second Annual Report of the President on Federal Advisory Committees 1 (1994). On February 10, 1993, President Clinton issued Executive Order No. 12838, directing

[2] We are not talking about the so-called independent regulatory agencies such as the Securities and Exchange Commission, Federal Communications Commission, Surface Transportation Board, etc., which, notwithstanding their designation as commissions or boards, are permanent federal agencies, and are funded as such.

[3] E.g., David Flitner Jr., The Politics of Presidential Commissions 7 (1986).

[4] Cong. Globe, 27th Cong., 2d Sess. 231 (1842), quoted in Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 Yale L.J. 51, 61 (1994).

executive branch departments and agencies to terminate at least one-third of the "advisory committees subject to FACA (and not required by statute) that are sponsored by the department or agency." By the end of fiscal year 1993, the number of advisory committees had dropped to 1,088. GSA Report cited above, at 1.[5]

The practice of creating and using these miscellaneous boards and commissions is not without controversy. One critic, not wholly without justification, says that the government "is literally drenched in advisory committees," and that "today there is a committee for almost any subject the mind of man can conceive."[6] Yet, counters another, "Surely they must have something important to offer to deserve such popularity. And they have."[7] The House Committee on Government Operations explained the reason for their popularity:

> "The advisory body creates a contribution by the governed to the Government. It provides a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost. Our Government and leaders are continually in need of advice on a variety of problems at all times in their attempts to find answers to the problems of our increasingly diversified and complex society. With the increased size and responsibilities of government, the number of advisory and interagency committees has also grown."[8]

[5]Although the number was to drop still further, GAO found that the costs and number of members per committee had increased. Federal Advisory Committee Act: Overview of Advisory Committees Since 1993, GAO/T-GGD-98-24 (November 5, 1997) (congressional testimony).

[6]Donald Lambro, The Federal Rathole 23-24 (1975).

[7]David S. Brown, The Management of Advisory Committees: An Assignment for the '70's, 32 Pub. Ad. Rev. 334 (1972).

[8]H.R. Rep. No. 91-1731, supra note 1, at 4.

A somewhat more cynical view comes from the pen of Herbert Hoover:

"There is no more dangerous citizen than the person with a gift of gab, a crusading complex and a determination to 'pass a law' as the antidote for all human ills. The most effective diversion of such an individual to constructive action and the greatest silencer on earth for foolishness is to associate him on a research committee with a few persons who have a passion for truth—especially if they pay their own expenses. I can now disclose the secret that I created a dozen committees for that precise purpose."[9]

2. Title 31 Funding Provisions

Regardless of whether one likes or dislikes the use of boards and committees, there are a lot of them around, they are here to stay, and someone has to pay their bills. If, as we have noted elsewhere, the central theme of federal fiscal law is the quest for balance between executive flexibility and legislative control, the funding of miscellaneous boards and committees is unquestionably a microcosm of this reality.

Historically, Congress has asserted its presence in the area by enacting funding restrictions, now found mostly in Title 31 of the United States Code. The key provisions are 31 U.S.C. §§ 1346 and 1347. These provisions are an amalgam of over a century's worth of legislation. We set out section 1346 in full here and will refer to specific portions in our discussion of this area of the law.

"§ 1346. Commissions, councils, boards, and interagency and similar groups

"(a) Except as provided in this section—

"(1) public money and appropriations are not available to pay—

"(A) the pay or expenses of a commission,council, board, or similar group, or a member of that group;

"(B) expenses related to the work or the results of work or action of that group; or

"(C) for the detail or cost of personal services of an officer or employee from an executive agency in connection with that group; and

[9] The Memoirs of Herbert Hoover: 1920-33 281, quoted in Thomas R. Wolanin, Presidential Advisory Commissions—Truman to Nixon 3-4 (1975).

> "(2) an accounting or disbursing official, absent a special appropriation to pay the account or charge, may not allow or pay an account or charge related to that group.

"(b) Appropriations of an executive agency are available for the expenses of an interagency group conducting activities of interest common to executive agencies when the group includes a representative of the agency. The representatives receive no additional pay because of membership in the group. An officer or employee of an executive agency not a representative of the group may not receive additional pay for providing services for the group.

"(c) Subject to section 1347 of this title, this section does not apply to—

> "(1) commissions, councils, boards, or similar groups authorized by law;
>
> "(2) courts-martial or courts of inquiry of the armed forces; or
>
> "(3) the contingent fund related to foreign relations at the disposal of the President."

Section 1347, which comprises the so-called "Russell Amendment," is set out later in this discussion.

a. 1842: The First Attempt

The earliest congressional attempt to rein in the use of boards and committees grew out of controversy surrounding a commission appointed by President Tyler to investigate certain irregularities at the New York customs house. (The above quotation from Henry Clay is from this debate.) The result was section 25 of the Act of August 26, 1842, ch. 202, 5 Stat. 523, 533, which, with certain exceptions, prohibited the payment of "any account or charge whatever" in connection with "any commission or inquiry . . . until special appropriations shall have been made by law to pay such accounts and charges." The prohibition is now found at 31 U.S.C. § 1346(a)(2); subsections (c)(2) and (c)(3) are the exceptions.

Initially, this attempt was successful. The Attorney General had occasion to consider the statute less than two months after it was enacted. A private relief bill directed the Secretary of the Treasury to investigate, and estimate the damages resulting from, an incident with "emigrating Creek Indians." Treasury asked whether appointment of an individual to perform the investigation would be subject to the statute. Yes, replied the Attorney General. "The words of the law are too comprehensive to admit of any exception, and too express to warrant any relaxation." 4 Op. Att'y Gen. 106 (1842). The following year, the Attorney General discussed the statute in this much-quoted passage:

> "The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of 26th August, 1842 . . . ." 4 Op. Att'y Gen. 248 (1843).

The Attorney General went on to point out that payment would require a specific appropriation. Charging a general appropriation would not suffice because general appropriations must be read as limited by existing prohibitory statutes. Id. at 249.

The "undoing" of the 1842 restriction began with a 1915 decision of the Comptroller of the Treasury who quoted the Attorney General's 1843 opinion and agreed that "the purpose of this provision was to prohibit, indirectly, the creation of commissions by the executive [branch] through its inherent power to make appointments." 21 Comp. Dec. 442, 443 (1915). However,—

> "I do not think it was the intent or purpose of this law to prohibit the use of an appropriation otherwise available, though general in terms, for the payment of expenses of a commission specifically authorized by Congress." Id.

In this way, a general appropriation available for the expenses of a body specifically created by Congress became a "special appropriation" for purposes of the 1842 law. Id. at 443-444.

The 1842 attempt to restrict funding for boards and committees was further weakened by a distinction alluded to in an early GAO decision. This distinction, between a group of persons acting individually and a group acting collectively, would be invoked under all subsequent legislation on this subject. The Secretary of War had sent four men to the Canal Zone to investigate existing conditions at the Panama Canal. Each had his own area of expertise, and the governing legislation authorized the President to appoint or employ persons to carry out his responsibilities. In finding the 1842 statute inapplicable, the Comptroller General stated:

> "The right of the President to appoint any one of these experts to advise him in an individual capacity would undoubtedly be authorized . . . . If he sees fit to appoint or

employ four experts to make a concurrent investigation and report on the various matters of which each is an expert in his particular field, it would not appear that such designation of the individuals thus selected would make them a 'commission [or] inquiry' in the legal sense of the term." Review Nos. 2249 et al., August 22, 1922.[10]

The 1842 enactment never purported to address the extent of the executive's power to create boards and committees, and even though it is still on the books, these administrative interpretations mean that it is no longer a significant funding impediment either.

b. 1909: The Tawney Amendment

The next congressional attempt to control boards and committees grew out of President Theodore Roosevelt's creation in 1909 of a Commission on Fine Arts to advise on artistic aspects of certain public structures and monuments.[11] The following year, Congress gave the Commission a permanent statutory basis in what is now 40 U.S.C. § 104. Before doing that, however, disturbed over the President's willingness to create such bodies without first obtaining congressional approval, it enacted the Act of March 4, 1909, ch. 299, § 9, 35 Stat. 945, 1027, which prohibited the use of appropriated funds to pay any expenses in connection with any commission, council, board, or similar body, or any members of such a group, "unless the creation of the [group] shall be or shall have been authorized by law." This statute, sometimes referred to as the Tawney Amendment, is now found at 31 U.S.C. §§ 1346(a)(1) (prohibition) and 1346(c)(1) ("authorized by law" exception).

This second congressional attempt met with weakening administrative interpretations even more swiftly than did the first attempt. Less than two months after it was enacted, the Attorney General held that the 1909 law did not apply to groups consisting entirely of government officers or employees dealing with matters relating to their scope of employment. 27 Op. Att'y Gen. 308 (1909); 8 Comp. Gen. 294 (1928); B-79195, September 30, 1948. As the Attorney General stated in another opinion, it would make no sense

[10]The 1922 decision failed to address 4 Op. Att'y Gen. 106, which found the statute applicable to the appointment of a single individual, but the point would appear moot in view of the authority to hire experts and consultants now found in 5 U.S.C. § 3109.

[11]Bybee, supra note 4, at 63-65.

to construe the statute as prohibiting an agency head "from submitting to the concurrent investigation and report of several employees of his department any question which he might submit for investigation to any one of them." 27 Op. Att'y Gen. 300, 307 (1909). The same applies to experts and consultants as long as their employment has been properly authorized. 37 Op. Att'y Gen. 484 (1934).

The key question under this statute is the meaning of "authorized by law." Once again, the Attorney General took the lead, adopting an interpretation that effectively weakened the law's requirements. Noting that every action an agency takes does not have to be spelled out in legislation, he concluded:

"Congress did not intend to require that the creation of the commissions, etc., mentioned should be specifically authorized by a law of the United States, but that it would be sufficient if their appointment were authorized in a general way by law." 27 Op. Att'y Gen. 432, 437 (1909).

The Comptroller of the Treasury followed suit. 16 Comp. Dec. 422 (1910); 16 Comp. Dec. 278 (1909) (quoting extensively from the Attorney General's opinion). Somewhat inexplicably, several early GAO decisions took the position that specific authority was required.[12] The difficulty with this divergence was that the Attorney General's conclusion was supported by some pretty strong legislative history (27 Op. Att'y Gen. at 437). Finally, in 22 Comp. Gen. 140 (1942), the Comptroller General reviewed this legislative history, repudiated the earlier "specific authority" decisions, and adopted the Attorney General's "authorized in a general way" formulation.

To avoid rendering the statute totally meaningless, GAO developed the following approach:

"[T]here must be sufficient authority in general or specific terms for the creation of a commission, board, etc., such as an authorization for work which could be accomplished only by a commission, board, etc., or authorization for duties of such

[12] E.g., 11 Comp. Gen. 331 (1932); 5 Comp. Gen. 231 (1925); A-33870, October 29, 1930; A-16348, November 23, 1926. We say "inexplicably" because other decisions issued during this time period recognized, and purported to agree with, the Attorney General's conclusion. See 11 Comp. Gen. 495, 497 (1932); A-23238, June 20, 1928.

a nature generally recognized as best performed by a commission, board, etc." 11 Comp. Gen. 495, 497 (1932).

Virtually identical statements are found in 31 Comp. Gen. 454, 455 (1952) and B-116975, April 27, 1954, at 4.[13]

There needs to be something more than just the authority to perform the function because the "authorized by law" portion of the statute applies to creation of the body, not performance of the function. See, e.g., B-51203, August 14, 1945; 6 Op. Off. Legal Counsel 541, 549 (1982). The fact situation in the 1909 Attorney General opinion, 27 Op. Att'y Gen. 432, is a good example. The War Department then, as does the Army Corps of Engineers now, performed a variety of civil works functions. Incident to one of them, Congress directed that the work not injure "the scenic grandeur of Niagara Falls." The Department pointed out that it did not have on its payroll experts in "scenic grandeur," and when it had received similar mandates in the past, it went out and contracted for the necessary expertise, often in the form of a committee. This was sufficiently "authorized by law" for purposes of the 1909 prohibition. Similarly sufficient was the situation in 40 Comp. Gen. 478 (1961). The Interior Department had specific authority to consult with various private parties on certain forest matters. For decades, it had done this by the use of advisory bodies. In view of this longstanding practice, the consultation statute could be viewed as furnishing the necessary authority.

In contrast, where an agency was authorized to conduct certain investigations and to employ experts and others for carrying out agency functions, and where the agency had in fact conducted the investigations for many years without an advisory body, there was no basis to find the body authorized by law, even in a "general way." 31 Comp. Gen. 454 (1952).

[13] A more recent decision stated the principle with a minor change in language:

"[The 1909 law] does not necessarily require that commissions, councils, boards, and other such bodies be specifically established by statute. . . . General or specific authority to perform functions or duties is sufficient to allow payment of the expenses of boards, commissions, etc., if such duties or functions can be performed only by such a group or if it is generally accepted that such duties can be performed best by such a group." 40 Comp. Gen. 478, 479 (1961) (citations omitted).

The "authorized in a general way" standard is also met if a department includes a board or commission in its budget justification materials and Congress enacts a lump-sum appropriation without prohibiting the item. B-38047, November 8, 1943. See also B-116975, April 27, 1954.

Section 1346(a)(1) does not override 31 U.S.C. § 1301(a), the purpose statute. B-182398(1), March 29, 1976. Nor is it affected in any way by 5 U.S.C. § 5703, the "invitational travel" statute. 27 Comp. Gen. 630 (1948). Of course, if the "authorized in a general way" standard is legitimately met, there should be no problem under either statute.

Applying section 1346(a)(1) to a given entity requires analysis of the entity's nature and functions. What it happens to be named is not the controlling factor. 27 Op. Att'y Gen. 406, 409 (1909); A-16348, December 8, 1926. The Justice Department has also cautioned that adding diverse functions could cause a board or commission to lose its "authorized in a general way" status. 6 Op. Off. Legal Counsel 541, 550 (1982).

Finally, cases under the 1909 statute continue to recognize the individual versus unit distinction first noted in connection with the 1842 law. A case previously cited, B-116975, April 27, 1954, involved three people inspecting coffee for the Army. It was significant that, although the three conducted their inspections independently, the majority vote determined acceptance or rejection. Thus, the inspectors acted as a unit and the statute applied. The same reasoning applied to tea inspectors for the Navy in 6 Comp. Gen. 140 (1926).[14]

Setting aside subsequent developments for the moment, the combined effect of the 1842 and 1909 enactments—31 U.S.C. §§ 1346(a) and (c)—was that boards and committees created by executive action could be funded if their creation was authorized ("in a general way"), or if Congress appropriated funds for that purpose.

[14] 6 Comp. Gen. 140 is one of the "specific authority" cases and to that extent has been modified by 22 Comp. Gen. 140. This, however, has no bearing on the point noted in the text.

c. 1944: The Russell Amendment

Peace prevailed between the branches over the use of boards and committees for a few decades, but ended in 1944 when congressional concern over some of Franklin D. Roosevelt's creations prompted another piece of legislation, forming a "veritable Maginot Line of barriers to funding commissions."[15] This third attempt at congressional control was the so-called Russell Amendment, Pub. L. No. 358, 78th Cong., § 213, 58 Stat. 361, 387. Now codified at 31 U.S.C. § 1347, it provides:

> "(a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence.
>
> "(b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section."

Section 213's sponsor stated its purpose as follows:

> "[T]he purpose of the committee amendment, which is apparent from a reading thereof, is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order, are doing.
>
> "Regardless of what agencies might be affected, the purpose of this amendment is to require them all to come to Congress for their appropriations after they have been in existence for more than a year." 90 Cong. Rec. 3119 (1944), quoted in 24 Comp. Gen. 241, 243 (1944).

The original language makes this intent a little clearer. "Agency" in subsection (a) originally read "any agency or instrumentality including those established by Executive order," and "specific authorization by law" originally read specific authorization for "the expenditure of funds" by the body. 58 Stat. 387.

As had happened with its predecessors, administrative interpretations have narrowed the Russell Amendment's scope and

[15] Wolanin, supra note 9, at 66.

impact. "Specific appropriation" does not mean that the appropriation has to mention the body by name. Inclusion of an item in an agency's budget justification, followed by a lump-sum appropriation which does not prohibit the item, is regarded as a "specific appropriation" for purposes of the Russell Amendment. 24 Comp. Gen. 241 (1944); B-44719, October 7, 1944.[16]

In 3 Op. Off. Legal Counsel 263 (1979), the Justice Department's Office of Legal Counsel concluded that the Russell Amendment does not apply to boards or committees that are purely advisory, stating the test as follows:

> "Mere advisors are not 'agencies' or 'instrumentalities' of Government for purposes of the Russell amendment. They do not become 'agencies' or 'instrumentalities' merely because they meet and advise collectively. They become 'agencies' or 'instrumentalities' for Russell amendment purposes only if the officer to whom they report seeks to invest them with actual authority to take substantive action on his or the Government's behalf." Id. at 265.

See also B-152583, November 7, 1963 (Russell Amendment not applicable to President's Committee on Equal Opportunity in the Armed Forces, which was purely advisory). Justice took this a step further a few years later, concluding that a council under the United States Information Agency whose functions were both advisory and operational (in this case, solicitation of contributions) was subject to the Russell Amendment because "it would discharge responsibilities vested by law in the USIA and would not be purely advisory." 6 Op. Off. Legal Counsel 541, 551 (1982). The operational aspect does not have to amount to "substantive action"; the law applies if the body "acts on behalf of the government or exerts any governmental power." Id.

3. Interagency Funding

a. Joint Funding of Common-Interest Project

It is necessary at the outset to distinguish between joint funding of a project and joint funding of a board, committee, or similar group.

[16]A question which does not appear to have been specifically addressed is whether the cases liberally construing 31 U.S.C. § 1347 can be said to have superseded, at least implicitly, the "specific means specific" approach of the cases under 31 U.S.C. § 1346(a)(2), such as 4 Op. Att'y Gen. 248 (1843).

While statutes address the latter, the former is governed by the normal rules regarding the obligation and expenditure of appropriated funds. If a project will benefit more than one agency, and as long as it is not something one of the agencies is required to do as part of its mission without reimbursement, then there is nothing that prohibits the agencies from funding the project in proportion to their benefit.

The point was made in an early case, A-7571, May 14, 1925. Several agencies, along with state and local bodies, were interested in development of the Colorado River and sponsored the construction and maintenance of three "gauging stations" along the river, under the supervision of the Interior Department's Geological Survey. Once it was determined that this was not something the Geological Survey was required to do anyway as part of its job—i.e., that there was no augmentation problem—it was fairly easy to conclude that "there appears no legal objection to the allocation of Federal Power Commission funds to pay for its proper share of the expenses incident to the maintenance of the stations from which it derives a corresponding benefit." Id. at 3. See also B-111199, August 20, 1952; B-51145, September 11, 1945.

A more recent decision dealt with joint funding of mutually beneficial research and demonstration projects by use of interagency agreements. Several environmental statutes authorize or direct the Environmental Protection Agency to cooperate with other federal and nonfederal entities. These were viewed as sufficient authority for interagency agreements, to be funded by transfers to the contracting agency from the other participating agencies. 52 Comp. Gen. 128 (1972). The decision pointed out the distinction between this type of interagency agreement—in which the participating agencies all had an interest—and an Economy Act agreement, in which the performing agency has "no specific interest apart from the provision of a routine service." Id. at 133. In view of the statutory provisions involved, there was no need to consider what EPA could or could not have done without those statutes.

In any joint funding case—project, board or commission, interagency agreement, etc.—the threshold question is purpose availability. Joint funding cannot be used if the source appropriation is not otherwise available for the object in question. B-182398, March 29, 1976. In other words, joint or interagency funding may not be used to expand the availability of any of the participating appropriations. Once you cross this threshold, use of a working fund as a financing device is permissible, but the money "must be obligated and expended in accordance with the statutes appropriating such funds and within the period of availability of the original appropriations." B-111199, August 20, 1952.

b. 1945: The First Interagency Funding Statute

Earlier in this section, we described the Russell Amendment, 31 U.S.C. § 1347. Less than a year after the Russell Amendment, Congress enacted section 214 of Pub. L. No. 49, 79th Cong., 59 Stat. 106, 134. Now codified at 31 U.S.C. § 1346(b), it authorizes interagency funding of groups engaging in activities of common interest.

Section 214's legislative history indicates that it was intended as an amendment to the Russell Amendment. Therefore, to the extent of its terms, it overrides the Russell Amendment's requirement to seek congressional appropriations after one year. B-75669, June 16, 1948. Also, since it specifically makes appropriations available, it overrides, again to the extent of its terms, the prohibition of 31 U.S.C. § 1346(a)(1) (the 1909 statute). 49 Comp. Gen. 305, 307 (1969);[17] 26 Comp. Gen. 354 (1946).

The current version of 31 U.S.C. § 1346(b), stemming from the 1982 recodification of Title 31, makes appropriations available for interagency groups "conducting activities common to executive agencies when the group includes a representative of the agency." The original language, which governs in a case like this,[18] was "authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof." 59 Stat. 134. It is clear from the original language ("in whole or in part") that the interagency group can include private parties in addition to the government representatives. 26 Comp. Gen. at 358.

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[17]49 Comp. Gen. 305 was erroneously overruled in part by 54 Comp. Gen. 1055 (1975), and reinstated by 56 Comp. Gen. 572 (1977).

[18]See, e.g., Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957).

Also, the current language would seem to require that the group include at least one representative from every agency participating in the funding. The original (governing) language did not necessarily say this, and in fact a 1962 decision stated:

"We do not read the language of [section 214] as making agency membership on an interagency board or committee a requisite to the availability of appropriations for meeting the expenses of such interagency groups. Nor have we found anything in the legislative history of the statute which would dictate that such membership is required. Thus in a proper case we would not be required to object to contribution by a nonmember agency toward the expenses of an interagency group, on the sole ground of nonmembership." B-150511, December 28, 1962.

Accordingly, the controlling factor is not membership, but "whether the interagency groups are 'engaged in authorized activities of common interest' to the contributing agencies." B-150511, January 9, 1963.

A device commonly used in interagency funding situations is a working fund. While there is nothing wrong with establishing a working fund as an accounting device, the Comptroller General has emphasized that this does not alter the availability of the amounts contributed. The funds advanced to a common fund by a participating agency remain available only for their original purposes, and only during the source appropriation's period of obligational availability. 28 Comp. Gen. 365 (1948); B-150963, July 9, 1963; B-51203, November 14, 1945. A working fund established to implement 31 U.S.C. § 1346(b) is not an Economy Act working fund. See 35 Comp. Gen. 201, 202 (1955).

Following are some examples of the application of 31 U.S.C. § 1346(b):

- The Federal Communications Commission could, upon making the standard "necessary expense" determination, use its appropriated funds to finance its share of something called the Radio Technical Commission for Aeronautics, an advisory group on aeronautical radio, even though the RTCA had never been authorized by statute or executive order. Payment would have been barred under 31 U.S.C. § 1346(a), but was permissible under 31 U.S.C. § 1346(b). 26 Comp. Gen. 354 (1946).
- The Defense Department could participate in funding an interagency group called the National Inventors Council since one of the

Council's functions was to encourage and screen inventions which might be useful in national defense as well as industry. 35 Comp. Gen. 201 (1955).

- The National Service Corps Study Group was established in 1962 to study the feasibility of a national service program patterned after the Peace Corps. It consisted of the Attorney General, the Secretaries of Agriculture, Interior, Commerce, Labor, and Health, Education and Welfare, plus some smaller agencies. Since the study extended into such fields as health, education, labor, housing, etc., it could fairly be regarded as being of interest to the agencies asked to participate in the funding. B-150963, July 9, 1963.
- The Defense Department could contribute to the funding of the President's Committee on Equal Employment Opportunity. B-148247, March 5, 1962.
- Agencies could pay "dues" to the Federal Automatic Data Processing Council, as long as the Council was using the money only for the kinds of expenses for which the source appropriations would be available. B-161214-O.M., April 24, 1967.
- The Federal Trade Commission could continue to pay the salary of an employee sent to Japan as part of an interagency trade mission. B-54464, December 14, 1945.

c. Appropriation Act Provisions

Each of the Title 31 provisions discussed thus far in this section entered the scene in the form of a permanent general provision contained in an appropriation act. In addition, appropriation acts may contain other relevant provisions, which may vary from agency to agency or year to year.

One governmentwide provision is of particular importance. In the 1960s, Congress became increasingly concerned over the proliferation of miscellaneous interagency bodies, created under the apparent "carte blanche" authority of 31 U.S.C. § 1346(b). At the time, the executive could use section 1346(b) to create an interagency body and, assuming compliance with the membership and common interest requirements, fund it indefinitely by "passing the hat." Congress once again began feeling left out.

The result was legislation that effectively modified 31 U.S.C. § 1346(b) by prohibiting the use of appropriated funds for interagency financing without prior and specific congressional approval for that type of financing. The provision first appeared in several appropriations acts for 1969. In 1972, it was inserted in the

Treasury-General Government Appropriations Act and made governmentwide ("this or any other act"). This history is outlined in B-147637-O.M., December 12, 1974.

The original version applied only to interagency groups under 31 U.S.C. § 1346(b). Eventually, Congress realized that this was narrower than it had intended, and dropped the specific reference to section 1346(b), as well as changed "congressional approval" to "statutory approval." The 1998 provision states:

> "No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality." Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 611, 111 Stat. 1272, 1310 (1997).

Note that the group itself may or may not be an interagency group; the statute is directed solely at the method of funding. The exemption for Federal Executive Boards first appeared in 1996.[19]

Section 611[20] does not apply to a government corporation statutorily authorized to determine the nature and character of its expenditures. B-174571, January 5, 1972 (FDIC). Nor does it apply to the Comptroller of the Currency, whose funds, by statute, are not to be construed as appropriated funds. Id. Thus, as the cited decision concluded, section 611 would not inhibit contributions by either body to the President's Commission on Financial Structure and Regulation.

GAO's first encounter with section 611 was 49 Comp. Gen. 305 (1969). The Veterans Administration wanted to contract with an individual to serve as director of the Interagency Institutes for Federal Hospital Administrators, the contract cost to be shared by the participating agencies. To start with, since 31 U.S.C. § 1346(b) partially superseded 31 U.S.C. § 1346(a) with respect to certain

[19] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 613, 110 Stat. 3009, 3009-356 (1996).

[20] The section number changes from year to year, but is always in the low 600s. For consistency, we will refer simply to "section 611."

interagency groups, there was no need to determine whether this particular group was "authorized by law." This was the good news. The bad news was that 31 U.S.C. § 1346(b) was itself partially overridden by section 611. Interagency funding would require prior and specific legislative approval. 49 Comp. Gen. at 307. Similarly, as we have already noted, 31 U.S.C. § 1346(b), to the extent of certain interagency bodies, also partially supersedes the one-year requirement of the Russell Amendment. Thus, the President could lawfully create an interagency Radiation Policy Council for a duration in excess of one year, but interagency funding would require compliance with section 611. B-196841-O.M., December 18, 1980. More recently, section 611 has been applied to a proposal to purchase solicitation services for the Combined Federal Campaign from an interagency entity. 67 Comp. Gen. 254 (1988).

The "prior and specific" approval can take different forms. One approach is section 629 of the 1998 Treasury-General Government appropriation act:

> "Notwithstanding section 611, interagency financing is authorized to carry out the purposes of the National Bioethics Advisory Commission." Pub. L. No. 105-61, § 629, 111 Stat. at 1315.

Since the statute authorizes the concept but not the precise method, there would presumably be some discretion in this regard—e.g., periodic reimbursement, advances to a working fund, etc.

Another approach is illustrated by the Joint Financial Management Improvement Program (JFMIP). The JFMIP was created administratively in 1947 as a cooperative effort by GAO, the Office of Management and Budget, and the Treasury Department. It received a statutory basis in the Budget and Accounting Procedures Act of 1950 (31 U.S.C. § 3511(d)). The Office of Personnel Management joined in 1966. At the present time, GAO initially charges the JFMIP's common expenses (e.g., executive director's salary and secretarial support) to its own appropriation and then, at the end of each fiscal year, bills the other three for 25% each of those common expenses. This funding method is expressly authorized by a proviso appended to GAO's appropriation language every year. See, for 1998, the Legislative Branch Appropriations Act, 1998, Pub. L. No. 105-55, 111 Stat. 1177, 1196 (1997). The purpose of the proviso was to comply with section 611. B-84260-O.M., September 12, 1974.

Perhaps the best illustration of the import and impact of section 611 is the saga of the Federal Executive Boards. In 1961, President Kennedy created interagency groups called Federal Executive Boards to better coordinate federal activities outside of Washington. Their number has increased over the years.[21] From the outset, the Boards were funded from the appropriations of the member agencies rather than by seeking direct appropriations. The enactment of section 611 gave the agencies something of a jolt because they had been supporting the Boards for up to ten years under 31 U.S.C. § 1346(b),[22] entirely legitimately, and now all of a sudden learned that they no longer had the authority to do so.

GAO's first written encounter with the problem came in 1973, when GAO's own field managers asked why they were being asked to pay FEB assessments from personal funds and if there was any way GAO could pick up the tab. GAO reviewed the history of section 611 and concluded that there was no way around the statute.

> "We see no possible alternative in the instant case to concluding the language of section [611] prohibits the GAO and all other Federal agencies from using their appropriated funds to provide administrative support, salaries, and reimbursement or payment of a member's assessments for Federal Executive Board activities."
> B-147637-O.M., December 12, 1974, at 6.

The solution, of course, was to seek specific authorization from Congress. Id.

In 1986, the Veterans Administration and the Small Business Administration came to the conclusion that section 611 barred interagency financing of the Federal Executive Boards, and sought GAO's concurrence. They got it. 65 Comp. Gen. 689 (1986). There was one possible—although probably not very feasible—way out. The decision added, "we see nothing to prevent a single agency with a primary interest in the success of the interagency venture, from picking up the entire costs." Id. at 692. Thus, if you could conclude that one agency had a "primary interest" in a particular Board activity, and if that agency were willing to pay the entire cost

[21] Standardized Federal Regions—Little Effect on Agency Management of Personnel, GAO/FPCD-77-39, at 2 (August 17, 1977).

[22] This fact may help suggest why Congress wanted to reinsert itself in the process.

without hope of reimbursement, it could do so. The next question, expectedly, was what does “primary interest” mean? It means that:

“an agency must have a substantial stake in the outcome of the interagency endeavor and the success of the interagency venture must further the agency’s own mission, programs or functions.” 67 Comp. Gen. 27, 29 (1987).

This latter decision also reiterated that section 611 barred in-kind as well as cash support. Mere attendance at meetings or functions, however, does not constitute support. Id.

One of the things Federal Executive Boards do is give awards. Absent the requisite statutory approval, an agency may not pay a pro-rata share of the expenses of a FEB awards banquet. B-219795, September 29, 1986. It can, however, pay or reimburse the fee charged to its own nominees, award recipients, and supervisors, under authority of the Incentive Awards Act. 70 Comp. Gen. 16 (1990). It can also, under the Incentive Awards Act, make awards to its own employees for services rendered to a Federal Executive Board. B-240316, March 15, 1991. Similarly, an agency may pay a reasonable registration fee for attendance of its employees at a Federal Executive Board training seminar. 71 Comp. Gen. 120 (1991).

Why this situation persisted for so many years is not clear. GAO had recommended as early as 1977 that the executive branch present the problem of Federal Executive Board funding to Congress.[23] In any event, as noted above, section 611 was amended in 1996 to exempt the Federal Executive Boards.

Another general provision which has been around for about ten years is section 617 of the 1998 Treasury and General Government Appropriations Act, 111 Stat. at 1312:

“Notwithstanding section 1346 of title 31, United States Code, or section 611 of this Act, funds made available for fiscal year 1998 by this or any other Act shall be available for the interagency funding of national security and emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities, as provided by Executive Order No. 12472 (April 3, 1984).”

[23] GAO/FPCD-77-39, supra note 21, at 24.

This provision first appeared as section 629 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-431 (1987).

If an instance of unauthorized interagency funding does occur, the appropriate remedy is an adjustment of accounts, that is, the recipient gives the donor back its money. B-182398-O.M., September 3, 1976. If the period of obligational availability has expired, the adjustment might not serve any useful purpose, even if the recipient entity has or can restore sufficient unobligated balances, because the donor agency could not use the money for new obligations. Id. Also, it would be inappropriate to pursue action against the certifying officers involved because, while there may have been a loss to a particular agency, there is no loss to the government, assuming the money was used for some authorized purpose of the recipient. Id.

4. The Federal Advisory Committee Act

a. Overview and Applicability

As we have noted, in the world of miscellaneous boards and committees, advisory committees are by far the largest single group. There are several types: general advisory committees, scientific and technical advisory committees, special clientele (industry) advisory committees, specific task (or action) advisory committees, research committees, and public conferences.[24] They are popular because they represent a relatively inexpensive way for the government to get expert advice, or at least advice from different perspectives; they are criticized because many tend to outlast their usefulness.

If reining in the proliferation of advisory committees is the measure, the century-plus series of fiscal statutes must be said to have met with very limited success. In the report of a 1970 study conducted by the Special Studies Subcommittee of the House Committee on Government Operations, Subcommittee Chairman John Monagan described the committees in the following terms:

[24] Brown, supra note 7, 32 Pub. Ad. Rev. at 335; Richard O. Levine, Comment, The Federal Advisory Committee Act, 10 Harv. J. on Legis. 217, 217-218 (1973).

"Sort of like satellites, I think of them in that way . . . They go out into outer space but they keep circling around, you know, and no one really knows how many there are or what direction they are going in, or what duplication there is."[25]

In 1972, Congress enacted the first attempt to comprehensively regulate advisory committees—the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. 2 §§ 1-16, as amended. FACA's purposes are "to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about [their] membership and . . . activities."[26] It does this by regulating the creation, operation, and termination of executive branch advisory committees. The theory, in plain English, is to start when you're needed and quit when you're done. The General Services Administration is given the job of prescribing "administrative guidelines and management controls applicable to advisory committees." Id., § 7(c). GSA's regulations are found in 41 C.F.R. Subpt. 101-6.10.[27]

The key issue under FACA, and certainly the most hotly litigated, is how to determine whether or not the statute applies to a particular body. As discussed later, this determination has fiscal consequences. In addition, wholly apart from fiscal matters, a determination that FACA applies means that, among other things: the committee must prepare a detailed charter and file it with appropriate officials before it can meet or take any action (5 U.S.C. App. 2 § 9(c)); its meetings must be open to the public (5 U.S.C. App. 2 § 10(a)(1)); notice of each meeting must be published in the Federal Register

[25]H.R. Rep. No. 91-1731, supra note 1, at 2 (quoting a statement made in committee hearings).

[26]Michael H. Cardozo, The Federal Advisory Committee Act in Operation, 33 Admin. L. Rev. 1, 10 (1981). The quoted passage is distilled from FACA § 2 (Findings and purpose). With respect to the objective of eliminating useless committees, see Carpenter v. Morton, 424 F. Supp. 603 (D. Nev. 1976); GAO, Better Evaluations Needed to Weed Out Useless Federal Advisory Committees, GGD-76-104 (April 7, 1977).

[27]The Supreme Court has said that the GSA regulations merit "diminished deference" because they were not issued contemporaneous with the statute, and section 7(c) talks about guidelines and controls, not regulations. Public Citizen v. Department of Justice, 491 U.S. 440, 463-465 n.12 (1989). The D.C. Circuit accords them no deference because FACA is "applicable to all agencies." Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993).

(5 U.S.C. App. 2 § 10(a)(2)); it must keep detailed minutes of each meeting (5 U.S.C. App. 2 § 10(c)); a designated officer or employee of the federal government must call or approve each meeting, and an officer or employee of the federal government must chair or attend each meeting (5 U.S.C. App. 2 §§ 10(e), (f)); and it must make transcripts of meetings available to the public at actual duplication cost (5 U.S.C. App. 2 § 11(a)). Advisory committees must "be fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 2 §§ 5(b)(2), 5(c); 41 C.F.R. § 101-6.1002(c); National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983).

As GAO has pointed out, FACA does not prescribe remedies or penalties for violations, nor does it expressly provide a private cause of action. Thus, assuming a plaintiff can establish standing and then establish some violation, it is up to the court, within the limits of judicial power, to devise an appropriate remedy. See B-278940, January 13, 1998. One court, after finding FACA violations, permanently enjoined the agency from using the advisory body's report, "the product of a tainted procedure." Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103, 1107 (11th Cir. 1994). Another potential form of relief is the declaratory judgment. E.g., National Nutritional Foods Association v. Califano, 603 F.2d 327, 336 (2d Cir. 1979). The Second Circuit further noted that, at least as of 1979, no court had used a FACA violation to "invalidate a regulation adopted under otherwise appropriate procedures." Id. Other forms of relief might include orders to open future meetings to the public, produce documents, or comply with any of FACA's other procedural requirements, depending on the precise violation. As far as we are aware, no court has yet to suggest that it could award a judgment for "money damages."

(1) Definition and specific exemptions

FACA § 3(2), as amended by the Federal Advisory Committee Act Amendments of 1997,[28] defines "advisory committee" as follows:

[28]Pub. L. No. 105-153, § 2(a), 111 Stat. 2689 (1997).

"The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—

"(A) established by statute or reorganization plan, or

"(B) established or utilized by the President, or

"(C) established or utilized by one or more agencies,

"in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration."

In assessing the scope of section 3(2), the first (and easiest) step is to exclude those entities FACA itself expressly exempts. Of the exemptions in section 3(2), committees composed wholly of government officials is the most important. For the most part, this is relatively straightforward and easy to apply, but not always. The issue in Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993), was the status of the President's spouse. President Clinton had asked the First Lady to chair his Task Force on National Health Care Reform. If she could be regarded as a government official, FACA would not apply because everyone else on the task force was unquestionably a government official. While it believed the question far from easy, Id. at 906, the court found persuasive the suggestion that "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President." Id. at 904 (emphasis omitted). The First Lady could therefore be deemed a "de facto" officer of the government for FACA purposes. Id. at 905.

The exemption for committees created by the National Academy of Sciences or the National Academy of Public Administration was added in the 1997 amendment.[29] While exempt from the section 3(2) definition, they are nevertheless subject to a set of procedures included in the 1997 legislation. FACA § 15. FACA § 4 further exempts committees whose enabling legislation specifically provides otherwise (this would be the case in any event); committees established or utilized by the Central Intelligence Agency or the Federal Reserve System; and certain state and local bodies.

Exemptions may, of course, appear in other statutes. For example, section 204(b) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 66, 2 U.S.C. § 1534(b), renders FACA inapplicable to meetings between federal and state, local, or tribal officials, if they deal solely with federal programs "that explicitly or inherently share intergovernmental responsibilities or administration."

Other exemptions derive from case law. The Justice Department has concluded that FACA does not apply to a body created jointly by the United States and another nation. 3 Op. Off. Legal Counsel 321 (1979). It has also found that the Smithsonian Institution is not an "agency" under FACA's definition. Consequently, FACA would not apply to advisory bodies established by the Smithsonian. 12 Op. Off. Legal Counsel 122 (1988).

[29]The original version of section 3(2), on the books until the 1997 amendment, exempted the Commission on Government Procurement and the Advisory Committee on Intergovernmental Relations. The Procurement Commission finished its job and went home in 1973. The ACIR was terminated in 1995, but extended the following year for the sole and limited purpose of performing a contract with the National Gambling Impact Study Commission. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title IV, 109 Stat. 468, 480 (1995) (termination); Pub. L. No. 104-328, 110 Stat. 4004 (1996) (extension).

If the specific exemptions do not resolve the question, there are several principles that are relevant in assessing applicability. They are, unfortunately, often difficult to apply, and we do little more than note them and allude to the problem areas.[30]

(2) Advisory versus operational

FACA applies to committees which are purely advisory. It does not apply to bodies that are "operational." See FACA § 9(b) ("[u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions"); FACA § 2(b)(6) ("the function of advisory committees should be advisory only"). With respect to these provisions, as one court has said, "Congress intended that federal decision makers, not their advisers or delegatees, execute federal policy." Consumers Union v. Department of Health, Education and Welfare, 409 F. Supp. 473, 477 (D.D.C. 1976), aff'd 551 F.2d 466 (D.C. Cir. 1977). The Justice Department has offered a useful test: does the body make or implement decisions itself, or does it offer advice to federal officials who themselves will then make the decisions? 5 Op. Off. Legal Counsel 283, 285 (1981).

Illustrative cases include Sofamor Danek Group v. Gaus, 61 F.3d 929 (D.C. Cir. 1995) ("Low Back Panel," although established by government, was charged with developing guidelines for health care practitioners rather than providing advice to federal government, and was therefore operational); Public Citizen v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 753 (D.D.C. 1985) (Bicentennial Commission primarily operational and therefore exempt); 57 Comp. Gen. 51 (1977) (same result for National Commission on the Observance of International Women's Year); B-222831, May 30, 1986 (internal memorandum) (Statue of Liberty - Ellis Island Foundation). The fact that the commission may be required to submit reports to the President and/or Congress when it has finished its work does not change the result. Public Citizen, 622 F. Supp. at 758. These cases, by the way (except for Sofamor

[30]Good references are Stephen P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. 111 (1996); Stephen P. Croley and William F. Funk, The Federal Advisory Committee Act and Good Government, 14 Yale J. on Reg. 451 (1997).

Danek), point to one type of body which is almost always operational—the commemorative or memorial commission. Their role is usually to plan, coordinate, and implement a particular celebration. Further examples of this type are the Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, 98 Stat. 1257 (1984); the Civil War Centennial Commission, Pub. L. No. 85-305, 71 Stat. 626 (1957); and the National Capital Sesquicentennial Commission, Pub. L. No. 80-203, 61 Stat. 396 (1947).

The more difficult situation arises when a body has both advisory and operational functions. FACA clearly anticipates its applicability to committees with some operational functions. For example, a committee's charter—which is not required for an exempt entity—must specify "a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions." FACA, § 9(c)(F). Also, the fragment of FACA § 9(b) quoted above explicitly recognizes the inclusion of nonadvisory functions if specifically provided by statute or Presidential directive. The GSA regulations implement this by exempting committees which are "established to perform primarily operational as opposed to advisory functions." 41 C.F.R. § 101-6.1004(g). An illustrative case is Natural Resources Defense Council v. EPA, 806 F. Supp. 275 (D.D.C. 1992) (EPA's Governors' Forum on Environmental Management primarily operational because participating state governors acted as independent chief executives in partnership with EPA in implementing pertinent legislation). GSA's regulation provides further that a "primarily operational" committee can become subject to FACA "if it becomes primarily advisory in nature." 41 C.F.R. § 101-6.1004(g).

(3) Who is being advised?

The definition in FACA § 3(2), quoted above, refers to bodies established or utilized "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." FACA § 3(3) expressly incorporates the Administrative Procedure Act definition of "agency," 5 U.S.C. § 551(1), which specifically excludes Congress. See also FACA § 2(a). Thus, assuming the absence of any other disqualifying factors, an advisory committee will be subject to FACA if it advises the President and/or an executive agency. A body which advises Congress is exempt. E.g., B-135945, March 29, 1973 (National Study Commission established by Federal Water Pollution Control Act exempt from FACA because it advises Congress). As that decision points out, language to specifically include Congress was contained in earlier versions of FACA but was deleted prior to enactment. Similarly, a body established to advise the Comptroller General, an official of the legislative branch, is for that reason not subject to FACA. B-130961-O.M., February 12, 1974.

What if an advisory body is required to report both to Congress and to the President and/or an executive agency? An early decision espoused the simplistic view that merely including Congress on the list of recipients is enough to invoke the exemption. B-178395, April 26, 1973. However, this essentially "form over substance" approach has not been followed, and later opinions by GAO and the Justice Department stress the need to examine the committee's nature and essence. For example, the legislation establishing the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research directed the commission to report to the President, the Congress, and the Secretary of the (then) Department of Health, Education, and Welfare. Considering all relevant factors—the legislative scheme in its entirety, the legislative history, and the real essence of the commission's functions—GAO concluded that the commission was "viewed by Congress as a body intended primarily to provide assistance to the Secretary," and therefore subject to FACA. B-143181, October 9, 1975. Similarly, the Justice Department concluded that the Native Hawaiians Study Commission was established primarily to advise Congress and was accordingly exempt from FACA, even though it was required to report as well to the President. 6 Op. Off. Legal Counsel 39 (1982).

Justice has applied the same type of approach where an advisory committee reports to several executive branch recipients, some of which are covered by FACA and some of which are exempt. See 12 Op. Off. Legal Counsel 11 (1988) (Presidential Task Force on Market Mechanisms exempt from FACA because of its relationship to the Federal Reserve Board, notwithstanding that it also reports to the President and Secretary of the Treasury).

(4) "Established or utilized"

A key portion of FACA's section 3(2) definition is that the group be "established or utilized" by the President or by one or more agencies "in the interest of obtaining advice or recommendations for the President or one or more agencies." Of the two words, "established" tends to be the easier to apply. It generally means created directly by a statute, the President, or a federal agency. "Established by statute" requires that the statute at least directly authorize the creation of advisory committees, if not the specific committee in question; committees "which merely can be said to owe their existence to legislation" do not meet the standard. Lombardo v. Handler, 397 F. Supp. 792, 796 (D.D.C. 1975), aff'd mem. 546 F.2d 1043 (D.C. Cir. 1976). A group established by a government contractor is not, for FACA purposes, established by the government. E.g., Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990).

Also, since FACA § 3(3) defines "agency" by incorporating the Administrative Procedure Act definition, FACA will not apply to a body, however advisory it may be, created by a government entity not covered by the APA definition. For example, an advisory body established by the United States Sentencing Commission, an agency in the judicial branch, was found exempt from FACA in Washington Legal Foundation v. United States Sentencing Commission, 17 F.3d 1446 (D.C. Cir. 1994). The reason is that the APA definition excludes "the courts" and "the Congress," and the courts have broadly construed this as excluding basically the entire judicial and legislative branches. Id. at 1449. See also Aluminum Company of America v. National Marine Fisheries Service, 92 F.3d 902 (9th Cir. 1996) (group formed by federal and nonfederal litigants to advise on compliance with court order was prompted, if by any single agency, by the district court and therefore exempt from FACA).

The word "utilized" is much more difficult. Prior to 1989 at least, there was no universally accepted approach to its application. The problem is that giving "utilized" its ordinary meaning, "make use of," would bring in a variety of private bodies seemingly beyond the scope of FACA's intended reach. Some courts applied a fairly straightforward approach. E.g., Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974) (agency which solicited comments from private industry group incident to considering change to regulations indisputably "utilized" that group to obtain advice).

Others, viewing the term "utilized" as ambiguous, were guided more by legislative history. E.g. Lombardo v. Handler, 397 F. Supp. at 800.

The Supreme Court confronted the issue in Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989). The question was whether FACA applied to consultations between the Justice Department and a standing committee of the American Bar Association regarding potential nominees for federal judgeships. Clearly, the standing committee was not "established" by the President or by the Justice Department. Equally clearly, if "utilized" were given its ordinary meaning, then the ABA committee was "utilized" by Justice.

However, the Court realized that a literal reading of section 3(2) would expand FACA's coverage far beyond what Congress had in mind, and would also implicate constitutional concerns. In what may become the most quoted judicial statement since "I know it when I see it," the Court called the word "utilize" a "woolly verb, its contours left undefined by the statute itself." 491 U.S. at 452. This being the case, the Court looked to legislative history to shear the wool, and found that Congress seemed concerned mostly with "groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status." Id. at 461. The Court continued:

> "The phrase 'or utilized' . . . appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations . . . 'for' public agencies as well as 'by' such agencies themselves." Id. at 462.

Under this approach, the ABA committee—privately formed, "in receipt of no federal funds and not amenable to . . . strict management by agency officials" (id. at 457)—was clearly excluded.

Several lower courts have suggested that Public Citizen treated "utilize" essentially as a form of "established." E.g., Aluminum Company of America, 92 F.3d at 905. While there is some truth to this and the distinction surely has been blurred, the fact remains that the statute uses the word "or" and that therefore they are two separate and exclusive concepts. Huron Environmental Activist League v. U.S. EPA, 917 F. Supp. 34, 40 n.6 (D.D.C. 1996). "Established" refers to a government-formed body while "utilized" refers to a group formed by nongovernment sources but which is nevertheless sufficiently close to an agency as to be amenable to management or control by that agency. Food Chemical News v. Young, 900 F.2d at 332-333. As the D.C. Circuit phrased it in another case, in light of the Public Citizen definition of "utilize"—

> "FACA can only apply if the committee is established, managed, or controlled for the purpose of obtaining advice or recommendations for the federal government." Sofamor Danek Group v. Gaus, 61 F.3d 929, 936 (D.C. Cir. 1995).

If one point emerges from Public Citizen and its progeny, it is that FACA will be difficult to apply to a body not established by the government. To cite a few examples, the following cases all found FACA inapplicable because the bodies in question were not "utilized" in the Public Citizen sense:

- Working groups created to aid in implementing a court order regarding the protection of an endangered species. The groups were not funded by the government, nor were they subject to federal management. Aluminum Company of America, 92 F.3d at 902.
- A group of experts established by a contractor to advise on food and cosmetic safety issues. Not only did the contractor, a private organization, not enjoy "quasi-public status," it set the group's agenda, scheduled its meetings, and reviewed its work. Food Chemical News v. Young, 900 F.2d at 333.
- Although the Environmental Protection Agency determined the schedule and made other logistical arrangements for meetings with cement industry group, there was no showing that the group was subject to EPA's management or control or that it was "so closely tied to the executive branch of the government as to render it a functionary thereof." Huron Environmental Activist League, 917 F. Supp. at 40.
- An advisory committee to the Sentencing Commission was not "utilized" by the Justice Department because it was not, and as a judicial branch entity could not be, managed or controlled by Justice. Minority membership on the committee (in this case, two Justice officials out of 16 members) is not control. Washington Legal Foundation, 17 F.3d at 1450-51.

(5) Other factors

Reminiscent of an interpretation that originated under the Title 31 statutes decades before FACA's enactment, FACA applies to a group acting as a group; it does not apply to individuals acting as individuals just because they happen to be in the same place while they are doing it. Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 915 (D.C. Cir. 1993) (FACA does not apply to "collection of individuals who do not significantly interact with each other"); Aluminum Company of America v. National Marine Fisheries Service, 92 F.3d 902, 907 (9th Cir. 1996) (quoting Physicians and Surgeons). The GSA regulations reflect this point. 41 C.F.R. § 101-6.1004(i), discussed in B-202455, August 30, 1984, and B-202455, March 21, 1985. As the Justice Department has put it:

"FACA applies by its terms to 'advisory committees.' 'Advisory committee' is a term that connotes a body that deliberates together to provide advice. Therefore, as a matter of statutory construction, we believe that FACA does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear." 14 Op. Off. Legal Counsel 53, 55 (1990).

The requirement that a committee act as a committee does not mean that it must give "consensus advice." Physicians and Surgeons, 997 F.2d at 913.

Consensus or not, the advice must relate directly to governmental policy issues. Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996) (Presidential legal expense trust, established to help defray personal legal fees, not subject to FACA); Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 1001 (D.D.C. 1994); 41 C.F.R. § 101-6.1003 (GSA's definition of "advisory committee").

An important, although not in and of itself necessarily conclusive, factor is the degree of formality attaching to the group. An early and often-cited FACA case held the statute inapplicable to a group whose "meetings are unstructured, informal and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." Nader v. Baroody, 396 F. Supp. 1231, 1234-35 (D.D.C. 1975). Other cases applied FACA to informal meetings. E.g., National Nutritional Foods Association v. Califano, 603 F.2d 327 (2d Cir. 1979); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974). The more recent trend seems to be to follow the approach of Baroody. Thus, the D.C. Circuit has stated:

"In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." Physicians and Surgeons, 997 F.2d at 914, cited in Aluminum Company of America, 92 F.3d at 906 ("existence of a formal and structured group leans toward a finding of FACA applicability").

See also Huron Environmental Activist League v. U.S. EPA, 917 F. Supp. 34, 42 (D.D.C. 1996); Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 1001 (D.D.C. 1994).

A group's funding is also relevant but not conclusive. One of the factors the Supreme Court noted in holding FACA inapplicable to the American Bar Association's committee on federal judgeships was that it was "in receipt of no federal funds." Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 457 (1989). See also Aluminum Company of America, 92 F.3d at 906. Thus, the absence of federal funding is a factor supporting a conclusion of nonapplicability. The presence of federal funding would not, in view of all the other ways to fall outside the statute, appear to be particularly revealing one way or the other. While the mere existence of federal funding may not tell you very much, its precise source may. For example, in determining that a particular committee was designed primarily to advise Congress rather than the President, the Justice Department found it relevant that the committee was originally funded from the contingent fund of the Senate. 6 Op. Off. Legal Counsel 39, 41-42 (1982). See also 13 Op. Off. Legal Counsel 285, 290 n.11 (1989) for a case in which no clear inferences could be drawn.

The status of subcommittees or subgroups is not entirely clear. The FACA § 3(2) definition expressly includes boards, committees, etc., "or any subcommittee or other subgroup thereof." One court has found that task forces of the President's Private Sector Survey on Cost Control were not subject to FACA because "[t]hey do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee." National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 529 (D.D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). Under this approach, the subgroup operates essentially as staff of the parent committee. In an internal memorandum, B-199008-O.M., June 14, 1983, at 9, GAO questioned whether this is really what Congress had in mind:

"One would expect most subcommittees or subgroups to report to their parent committee, rather than bypassing the parent committee and reporting directly to a Federal official. . . . There is no reason to presume that Congress intended subcommittees or subgroups to be included only in those unusual circumstances where they side-step their parent committees."

The D.C. Circuit revisited the issue in a 1993 case, Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898, the issue being the status of a working group set up to assist the President's Task Force on National Health Care Reform. Although not expressly repudiating the Anti-Hunger reasoning in all cases, the court now pointed out that "we did not explicitly approve the judge's reasoning relating to the supposed staff groups." 997 F.2d at 912. While the court did not have sufficient information to decide the issue, it hinted strongly that subgroups would be subject to different degrees of stringency depending on whether the parent group was (as in Anti-Hunger) or was not (as in Physicians and Surgeons) itself subject to FACA.

"In contrast to the situation here, in Anti-Hunger the top levels of the *outside* advisory groups were covered by FACA . . . . In that scenario, there is less reason to focus on subordinate advisers or consultants who are presumably under the control of the superior groups. . . . But when the Task Force itself is considered part of the government—due to the government officials exemption—we must consider more closely FACA's relevance to the working group. For it is the working group that now is the point of contact between the public and the government." Id. at 913 (emphasis in original).

The court did not address the extent to which the distinction would be relevant, if at all, where the parent body is exempt from FACA for some reason other than the government officials exemption.

b. Creation and Funding

Funding of a federal advisory committee depends largely on how it was created. Creation is addressed in FACA § 9:

"(a) No advisory committee shall be established unless such establishment is—

> "(1) specifically authorized by statute or by the President; or
>
> "(2) determined as a matter of formal record by the head of the agency involved after consultation with the Administrator [of General Services] with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law."

As this provision indicates, and as the GSA regulations reflect (41 C.F.R. § 101-6.1005), there are several ways to create an advisory committee:

- by statute;
- by the President, usually by executive order;
- by the President pursuant to statutory authorization;
- by an agency head.

Indeed, one of the significant features of section 9(a) is its explicit recognition of the nonstatutory creation of advisory committees by the executive branch.

(1) Statutory committees: creation

Congress can, of course, legislatively create committees or other groups, advisory and/or operational. Therefore, the discussion under this heading is not limited to advisory bodies. And to the extent applicable, a statute creating a board, commission, committee, or similar group will generally include the following elements:

(A) It will prescribe the group's functions and duties. Unless otherwise provided, this description will determine whether the group is "primarily operational" and thus exempt from FACA. If the group's functions include holding hearings or taking testimony, the statute may address such topics as the expenses of witnesses and the treatment of subpoenas. E.g., Pub. L. No. 104-169, § 5(a), 110 Stat. 1482, 1484-85 (National Gambling Impact Study Commission).

(B) It may address the group's status vis-a-vis FACA. The statute may expressly provide that the group is subject to FACA. E.g., 50 U.S.C. App. § 2169(i)(1) (advisory committees established by the National Commission on Supplies and Shortages). It may render the group wholly exempt from FACA. E.g., Pub. L. No. 98-399, § 5(c), 98 Stat. 1473, 1474 (1984) (Martin Luther King, Jr. Federal Holiday Commission). Or, it may exempt it from certain portions of FACA, implying that FACA is otherwise applicable. E.g., Pub. L. No. 93-348, § 211(a), 88 Stat. 342, 351-52 (FACA § 14—termination and renewal—not applicable to National Advisory Council for the Protection of Subjects of Biomedical and Behavioral Research).

(C) It will prescribe the group's membership and composition. To the extent the group will include or consist of private members, it will prescribe who is to appoint them. E.g., Pub. L. No. 86-380, § 3, 73 Stat. 703, 704 (Advisory Commission on Intergovernmental

Relations, members appointed by President, President of the Senate, Speaker of the House); Pub. L. No. 93-348, 88 Stat. 342, supra (members appointed by department head). The statute may prohibit members from holding any other position as an officer or employee of the United States during their period of service. E.g., 50 Comp. Gen. 736 (1971) (holding that membership on an advisory council was a position as an officer or employee for purposes of such a provision).[31] Absent a provision of this nature, nothing prohibits a private individual from serving on more than one committee. Similarly, a government official may serve on more than one body as long as "the person receives only one salary, the positions are not 'incompatible' from the standpoint of public policy, and there is no augmentation of relevant appropriations." 14 Op. Off. Legal Counsel 157, 160 (1990). See also 8 Op. Off. Legal Counsel 200, 205-206 (1984).

Mixing of the branches on a body with operational functions can be problematic. See 8 Op. Off. Legal Counsel 200 (1984). However, so far at least, no one has objected to persons from different branches serving together on a body which is purely advisory. E.g., 7 Op. Off. Legal Counsel 202 (1983). The executive branch does object to provisions which purport to place any restrictions (e.g., political or racial balance) on the President's appointment power. E.g., 14 Op. Off. Legal Counsel 157, 158 (1990).

(D) It will address the compensation of members and, if applicable, the hiring of staff. Members may or may not be compensated for their services, and members serving without compensation may nevertheless be allowed travel expenses. An example is Pub. L. No. 98-399, § 4(d), 98 Stat. 1473, 1474 (1984) (Martin Luther King, Jr. Federal Holiday Commission). Enabling statutes frequently provide that members who are officers or employees of the government or Members of Congress may not receive compensation for their service as members (because of the dual compensation laws, primarily 5 U.S.C. § 5533), but may be allowed travel expenses. E.g., Pub. L. No. 91-129, § 5(a), 83 Stat. 269, 271 (1969) (Commission on Government Procurement).

[31]For similar holdings in other contexts, see 24 Comp. Gen. 498, 500 (1945); 16 Comp. Gen. 495, 497 (1936); 23 Comp. Dec. 372, 374 (1917); 3 Op. Off. Legal Counsel 321, 322-323 (1979).

Payment of a per diem in lieu of subsistence is available only where authorized by statute. 20 Comp. Gen. 361 (1941); 10 Comp. Gen. 239 (1930). For committees subject to it, FACA § 7(d)(1)(B) provides the necessary authority. For other groups, the authority must be found elsewhere. E.g., 36 U.S.C. § 1403(a) (Holocaust Memorial Council).

In most cases, compensation is provided in one of two ways: (1) the "daily equivalent" of a specified grade/level of the General Schedule or Executive Schedule, or (2) a per diem basis, that is, a fixed number of dollars per day. In either case, compensation is payable only for days the member actually performs duties. The compensation is payable in full regardless of how much or how little the person works on any given day. (Of course, to trigger the entitlement at all, the "little" must exceed zero.) 45 Comp. Gen. 131, 133 (1965); 28 Comp. Gen. 211 (1948). (Both cases deal with per diem payments.)

Another type of compensation provision authorizes compensation in accordance with 5 U.S.C. § 3109, the expert and consultant statute. This will limit compensation to the highest rate for a GS-15 unless a higher rate is expressly provided by statute. 51 Comp. Gen. 224, 226 (1971); 43 Comp. Gen. 509 (1964); 29 Comp. Gen. 267 (1949).

For advisory committees under FACA, the statute imposes a compensation ceiling of the rate specified for GS-18. The regulations say GS-15 but allow a higher rate if the agency head can justify it. 5 U.S.C. App. 2 § 7(d); 41 C.F.R. § 101-6.1033. Both authorize the payment of travel expenses for duties performed away from home or regular place of business. Id.

A common provision exempts members and/or staff from the so-called civil service laws. GAO has held that the phrase "civil service laws" refers to the statutes and regulations governing appointments, and does not include the provisions, now also in Title 5, addressing salary rates. 53 Comp. Gen. 531 (1974). A more precise version of this language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service." Pub. L. No. 93-348, cited above, § 211(a), 88 Stat. at 352. If exemption from both is desired, the modern language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General

Schedule pay rates." E.g., Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 100-94, § 5, 101 Stat. 700, 701 (1987).

(E) It may make some provision for support services. The committee will need office space, office equipment, staff, etc. Especially if the committee is tied in by subject matter to some existing department, the legislation may direct that department to provide support services. In FACA § 5(b)(5), Congress reminds itself to include a support services provision. Operational groups are less likely to have such a provision since they will, for the most part, receive direct operating appropriations and can use them to procure the needed services, including use of the Economy Act. See B-157312, August 2, 1965. However, a body whose majority is nongovernment (government members were a majority in B-157312) does not have access to the Economy Act. 33 Comp. Gen. 115, 116-117 (1953).

Support service provisions may or may not be reimbursable. For example, the Interior Department is authorized to provide services and support to the Holocaust Memorial Council "on a reimbursable basis." 36 U.S.C. § 1404(e). In contrast, support services provided to the National Commission on Restructuring the Internal Revenue Service by the General Services Administration or the Treasury Department are to be "on a nonreimbursable basis." Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (1995). Still another variation leaves it to the parties to fight it out. E.g., Pub. L. No. 93-556, § 7(b), 88 Stat. 1789, 1792 (1974) (Commission on Federal Paperwork may obtain services from any government agency, "reimbursable or otherwise, as may be agreed" by the Commission and the agency).

(F) It will prescribe applicable reporting requirements. (See "Who is being advised" heading above.)

(G) It will most likely provide for the group's termination, at least for groups intended to have a short duration or single-project groups. A common provision mandates termination a specified number of days or months after submission of required reports. E.g., Pub. L. No. 88-606, § 4(b), 78 Stat. 982, 983 (1964) (Public Land Law Review Commission to terminate on earlier of fixed date or six months after submission of report). Some entities may simply terminate on a fixed date, an approach suitable for memorial commissions, for example. E.g. Pub. L. No. 98-101, § 7, 97 Stat. 719, 722 (1983) (Commission on the Bicentennial of the Constitution "shall terminate on December 31, 1989").

For groups subject to it, FACA addresses termination if the establishing legislation is otherwise silent. An advisory committee will terminate two years after its date of establishment unless its duration is "otherwise provided for by law." FACA § 14(a)(2)(B). The Justice Department has held that the nature of a group's functions may exempt it from the automatic termination of section 14. Specifically—

> "In our view, the duration of a statutorily created advisory committee may be 'otherwise provided for by law' either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for it a specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme." 3 Op. Off. Legal Counsel 170, 171 (1979).

The requirement to make "periodic reports and recommendations" meets this test. Id. at 173-174.

(2) Statutory committees: funding

A final element the enabling statute will address is funding. For the most part, a board or committee created by Congress is funded under the standard two-step procedure: "first the program is authorized and, subsequently, appropriations are made available to carry out the program." B-39995-O.M., April 28, 1983 (referring to the Cost Accounting Standards Board). In FACA §§ 5(b)(4) and (5), Congress tells itself to make sure that legislation contains provisions dealing with authorization of appropriations and the assurance that the advisory body will have funds available for its necessary expenses (although no precise mechanism is prescribed).

The authorization of appropriations may be indefinite, i.e., "such sums as may be necessary."[32] Others may include a monetary ceiling.[33] Still others may cover multiple-year periods either year-by-year or in the aggregate.[34] A variation provides a specific dollar authorization for the first year and "such sums as may be necessary" thereafter.[35] There appear to be no significant consequences flowing from which form is used, nor are we able to generalize as to when a particular form may be regarded as more appropriate.

The authorization is sometimes combined with language prohibiting expenditures except to the extent provided in advance in appropriation acts. E.g., 36 U.S.C. § 1408 (Holocaust Memorial Council); Pub. L. No. 104-169, § 9(b), 110 Stat. 1482, 1488 (1996) (National Gambling Impact Study Commission). Even without language of this sort, an appropriation would still be necessary to carry out the authorization.

The next step is the actual appropriation. There is no required form for the appropriation. It can be an appropriation made directly to the entity; it can be an appropriation to an existing agency to be funneled to the entity; or it can be included in a lump-sum appropriation to a department or agency related in subject matter. The authorization of appropriations may influence, if not limit, this choice. Some, for example, expressly authorize funds to be directly appropriated to the board or commission while others use more discretionary language (funds appropriated "for the activities of" the particular commission or simply "to carry out this act").

[32]Examples are the Commission on Government Procurement, Pub. L. No. 91-129, § 9, 83 Stat. 269, 272 (1969), and the Commission on Organization of the Executive Branch of the Government (the so-called Second Hoover Commission), Pub. L. No. 83-108, § 8, 67 Stat. 142, 144 (1953).

[33]E.g., Civil War Centennial Commission, Pub. L. No. 85-305, § 9, 71 Stat. 626, 628 (1957).

[34]E.g., Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, § 11(a), 98 Stat. 1257, 1262 (1984) (year-by-year); Commission on Merchant Marine and Defense, Pub. L. No. 98-525, § 1536(i), 98 Stat. 2492, 2635 (1984) (aggregate).

[35]Commission on the Bicentennial of the Constitution, Pub. L. No. 98-101, § 8, 97 Stat. 719, 723 (1983).

Whichever form is used, there is nothing particularly exotic about an appropriation for a miscellaneous board or commission. It is essentially no different from an appropriation for any other entity, and is governed by the same rules of purpose, time, and amount. The following paragraphs illustrate the application of some of these rules.

Appropriations can be used only for their intended purposes. This means the purposes stated in the appropriation and other pertinent legislation, as amplified by the "necessary expense" doctrine expounded in Chapter 4. E.g., B-211149, June 22, 1983 (because Holocaust Memorial Council had specific authority to solicit donations, it could pay employees or consultants who engage in fund-raising).

Entertainment is not a proper expenditure unless Congress has authorized it. One way Congress does this is to appropriate part of a lump sum for "official reception and representation expenses." While this is the device most commonly used for larger agencies, it works just as well for a small board or commission. E.g., the 1985 appropriation for the Japan-United States Friendship Commission, Pub. L. No. 98-411, 98 Stat. 1545, 1568 (1984). Another device Congress has used—primarily with celebration/memorial commissions—is to include in the enabling statute authority to act "without regard to the laws and procedures applicable to Federal agencies." A commission with this authority can feed and/or otherwise entertain itself from the taxpayers' pocket virtually at will. B-138969, April 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, April 15, 1959 (Civil War Centennial Commission); B-129102, October 2, 1956 (Woodrow Wilson Centennial Celebration Commission).

In making expenditures from a lump-sum appropriation, an agency's discretion is not legally limited by restrictions expressed in legislative history, but not carried into the statute itself. E.g., 31 Comp. Gen. 412 (1952) (National Capital Sesquicentennial Commission could spend its appropriation on authorized activities and was not bound to follow instructions contained only in a committee report).

Money received for the use of the government must, in accordance with the miscellaneous receipts statute, 31 U.S.C. § 3302(b), be deposited in the general fund of the Treasury, subject to exceptions discussed in detail in Chapter 6. For the most part, a body which is purely advisory should not be in a position to generate receipts, with the possible exception of recovering overpayments of compensation or travel allowances. Operational bodies, on the other hand, are more likely to be involved in activities that generate receipts and must therefore contend with the miscellaneous receipts statute.

Specific authority to credit receipts to its operating appropriation makes those funds available for expenditure without further congressional action, at least during the appropriation's period of obligational availability. B-90476, June 14, 1950 (charges for admission to exhibits, plays, and dramatic productions by the National Capital Sesquicentennial Commission). As noted above, language authorizing an agency to act without regard to the laws applicable to federal agencies is sufficient to remove the inhibition on entertainment expenditures. Such language is equally sufficient to overcome the miscellaneous receipts statute. B-136051, August 27, 1959 (sale of publications and commemorative medals by Civil War Centennial Commission). If the board or commission does not have specific authority to charge fees, it must rely on the so-called User Fee Statute, 31 U.S.C. § 9701, in which case the fees are fully subject to the miscellaneous receipts requirement. Since user fees and donations are two different things, the authority to treat donated funds as exempt from fiscal laws does not apply to user fees. B-275959, May 5, 1998 (Holocaust Memorial Council).

In a 1936 case, the Northwest Territory Celebration Commission found itself in a dilemma. As part of the celebration, it wanted to print and sell cartographic maps of the Northwest Territory and to produce a "moving pageant." The states formed from the Northwest Territory, with whom the Commission was statutorily charged to cooperate, would each order, and pay for, the desired number of maps and performances. While the states were perfectly willing to pay their proportionate shares, the problem was that the Commission lacked authority to retain the receipts, and thus would have depleted its appropriation without reimbursement. The solution was to somehow furnish the goods and services without charge to the Commission's appropriation. The way to do this was for each participating state to advance its estimated share, which would be held in the Treasury in a trust fund account, from which expenditures could be made. If this approach were followed, it would be necessary to account for each state's funds separately so that any remaining unexpended balances could be refunded. A-51645, November 6, 1936.

Where an appropriation includes a limit on obligations for a particular item, a supplemental appropriation cannot be used to exceed that limitation unless expressly provided. This rule does not apply—

"where the Congress does not explicitly provide for an increase in limitations theretofore prescribed, but the legislative history of the supplemental act shows that the additional funds were provided to administer new or additional functions and it is clearly shown that funds over and above the original limitations would be required to be expended in order that such functions may be carried out." B-114462, April 22, 1953.

That case held that the War Claims Commission could use funds from a supplemental appropriation for travel expenses incident to closing a field office, even though it would cause a ceiling on travel expenses in the original appropriation to be exceeded.

In the case of small celebration/memorial commissions, GAO has recommended that the statute authorize payment of the appropriation to the commission in one lump sum, at least where the statute does not otherwise address the handling of the commission's finances.

"It is the view of this office that in cases of small appropriations for sectional celebrations, memorials, etc., where the authorizing resolution does not provide for the administrative handling of obligations and expenditures from such appropriations by an existing Government agency, it is preferable that the money be appropriated for payment as a gift in one lump sum to an established local body without any further accounting to the Federal accounting officers. [This procedure] would remove the task of attempting at considerable cost to inform the inexperienced local person or body of persons in the field of the regulations, forms, and procedures required in accounting for public funds." B-8474, February 19, 1940, at 2.

The subject of that discussion was the Benjamin Harrison Memorial Commission, established by Pub. L. No. 76-352, 53 Stat. 1274 (1939). Shortly after GAO's opinion, the authorized amount was appropriated, "to be paid to the Commission for expenditure within its discretion" for authorized purposes. First Deficiency Appropriation Act, 1940, Pub. L. No. 76-447, 54 Stat. 82, 83 (1940). In such a situation, the commission is not required to account for the funds in the same manner as a regular federal agency. However, it is not free money and the commission does have a record-keeping responsibility, albeit a minimal one. "[I]t is felt desirable that you maintain an adequate record of such funds and of the expenditure thereof." A-84233, June 3, 1937 (Charles Carroll of Carrollton Bicentenary Commission).

Thus far, we have been talking about the fairly straightforward situation where Congress creates a body, authorizes the appropriation of funds, and then makes the appropriation. There are variations. Instead of creating the commission directly, Congress can authorize or direct the President to create it. E.g., Pub. Res. No. 106, 74th Cong., ch. 556, 49 Stat. 1516 (President authorized to establish Charles Carroll of Carrollton Bicentenary Commission); Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1511, 98 Stat. 2492, 2626 (1984) (President directed to establish Chemical Warfare Review Commission). Congress can fund the body by a direct appropriation (e.g., 50 Stat. 10 for the Carroll Bicentenary Commission), or it can tell the President, in effect, to go hunt for the money. See, e.g., 15 U.S.C. § 1022f(b) (advisory boards on national economic programs and policies). These statutes tend to be less detailed than their direct-creation siblings, the detail being filled in by the implementing executive order. E.g., Exec. Order No. 12,502, January 28, 1985 (Chemical Warfare Review Commission).

Congress may, either in conjunction with a direct appropriation or without it, require an existing department or agency to provide financial support services. For example, the law creating the Civil War Centennial Commission provided:

> "Expenditures of the Commission shall be paid by the National Park Service as general administrative agent, which shall keep complete records of such expenditures and shall account also for all funds received by the Commission." Pub. L. No. 85-305, § 6(b)(1), 71 Stat. 626, 627 (1957) (the Civil War Centennial Commission received direct appropriations).

Section 201 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 939 (1995), codified at 49 U.S.C. § 726(d)(2), authorizes the Secretary of Transportation or the Chairman of the Surface Transportation Board to "pay the reasonable and necessary expenses incurred by" the Railroad-Shipper Transportation Advisory Council. Another variation is to appropriate money to an existing agency, to be transferred to the board or commission when it is legally capable of receiving them. E.g., 2 Op. Off. Legal Counsel 366 (1977).[36]

Still another variation is found in the law establishing the National Commission on Restructuring the Internal Revenue Service:

> "The Secretary of the Treasury is authorized on a nonreimbursable basis to provide the Commission with administrative services, funds, facilities, staff, and other support services for the performance of the Commission's functions." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (1995) (emphasis added).

Absent a direct appropriation, this would appear to be sufficient authority for Treasury to fund the Commission. However, if Congress had been making direct appropriations and then stopped, a provision of this sort would enable the supporting agency to provide various kinds of stopgap or perhaps even supplemental financial assistance, but would not permit funding of the commission's entire operations, unless of course this was the reason Congress stopped making appropriations. B-39995-O.M., April 28, 1983 (Cost Accounting Standards Board).

A provision for a designated agency to provide support services to a board or commission would normally imply that the board or commission is not authorized to obtain the services directly. 61 Comp. Gen. 69, 75 (1981). However, in the cited case, the United States Advisory Commission on Public Diplomacy was able to bypass its support agency and contract directly for certain services because it also had specific authority to hire experts and consultants in accordance with 5 U.S.C. § 3109.

For bodies created and funded by Congress, advisory or non-advisory, FACA or non-FACA, the various funding restrictions described earlier in this section would not apply, except for the requirement for specific approval of interagency funding. One could concoct a scenario in which the Russell Amendment might come into play (e.g., a non-advisory body created by statute, with no appropriations of its own but funded by some existing agency), but it would be rare.

[36]Although not germane to the result or to the point made in the text, the "appropriation" cited in the OLC opinion was merely an authorization.

To sum up, when Congress statutorily creates a board or commission, or authorizes or directs the executive branch to do so, it can fund the entity through the traditional authorization-appropriation process used for larger agencies, or it can resort to techniques which are perhaps regarded as more suitable for certain small entities. Whether the body is advisory subject to FACA, advisory but not subject to FACA, operational, or mixed, would not appear to make any significant difference except that operational bodies are more likely to be funded by direct appropriations. Legislation establishing a FACA committee will almost surely make some provision for support services, possibly including some funding, but Congress has used this device in non-FACA bodies as well.

(3) Committees established by the executive branch

The Justice Department has advised that, with the possible exception of performing constitutional responsibilities in an emergency, the President lacks the power to create a new operational agency in the executive branch. Legislation is required. 9 Op. Off. Legal Counsel 76 (1985). However, this inhibition does not exist in the case of an advisory committee. As we have seen, the Federal Advisory Committee Act explicitly recognizes, in sections 3(2) and 9(b), the inherent authority of the President, and of agency heads, to establish purely advisory bodies.[37]

A President creating an advisory body typically does so by issuing an executive order. The executive order will basically include the same elements that are found in an enabling statute as outlined above. It will establish the body, prescribe its functions, and address membership and composition, compensation, support services, and any reporting requirements. It may also address termination and the applicability of FACA.

[37] Cf., e.g., Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 908 (1993) (court refuses to apply FACA in a way that would interfere with “the President’s capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates”).

As one court has noted, "FACA provides very little guidance as to the manner in which advisory committees are to be funded." Metcalf v. National Petroleum Council, 553 F.2d 176, 180 (D.C. Cir. 1977). Be that as it may, the executive order must also provide for funding. While most of the committee's needs will be met by the agency assigned to provide support services, it will still need some money for such things as travel expenses and printing of reports. The President, lacking the authority to authorize or appropriate funds, must look to some existing source. The most common approach is to designate an existing agency to provide funding, subject to the availability of appropriations. The funding agency must be sufficiently related in subject matter to the advisory body so as to pass muster from the perspective of purpose availability. Some examples, which will also provide some indication of the range of advisory bodies that are created, follow:

- Exec. Order No. 13,037, § 4(b) (1997): Commission to Study Capital Budgeting, funded by Treasury Department.
- Exec. Order No. 13,015, § 3(b) (1996): White House Commission on Aviation Safety and Security, funded by Department of Transportation.
- Exec. Order No. 12,961, § 3(c) (1995): Presidential Advisory Committee on Gulf War Veterans' Illnesses, funded by Department of Defense.
- Exec. Order No. 12,546, § 3(c) (1986): Presidential Commission on the Space Shuttle Challenger Accident, funded by the National Aeronautics and Space Administration.
- Exec. Order No. 12,367, § 3(b) (1982): President's Committee on the Arts and the Humanities, funded by the National Endowment for the Arts.
- Exec. Order No. 12,345, § 4(d) (1982): President's Council on Physical Fitness and Sports, funded by Department of Health and Human Services. (This was originally created by President Eisenhower in 1956, and has been renewed by successive Presidents.)
- Exec. Order No. 12,229, § 1-301 (1980): White House Coal Advisory Council, funded by Department of Labor.

The pertinent provisions of FACA are sections 5(b)(5), 5(c), 12, and 14. Section 5(b)(5) tells Congress to make provision for support services and funding in any legislation creating an advisory committee. Section 5(c) makes this applicable to the President or any other federal official creating an advisory committee.[38] Section 12(a) requires each agency to keep sufficient records to "fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities." The General Services Administration does this for Presidential committees. Section 12(b) directs each agency to be "responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise." Section 14 directs each advisory committee to terminate not later than two years after its creation, except that it can be renewed by the establishing authority for successive two-year periods.[39] Thus, FACA clearly condones the practice of using existing agency appropriations to fund advisory committees. See 63 Comp. Gen. 110, 111 (1983) (President's Commission on Executive Exchange funded by Office of Personnel Management's "salaries and expenses" appropriation); 61 Comp. Gen. 69 (1981) (United States Advisory Commission on Public Diplomacy funded by United States Information Agency).

If the agency providing funding has several appropriations, as in the case of cabinet departments, it must select the one most closely related to the committee's functions, applying the principle that the specific prevails over the general. See B-202362, March 24, 1981 (funding for United States-Japan Economic Relations Group, provided by State Department, is chargeable to appropriation for "International Conferences and Contingencies" rather than "salaries and expenses").

Of course, any expenditure by the committee must be for an authorized purpose. E.g., 61 Comp. Gen. 69 (1981) (committee could procure outside legal advice on the extent of its independence). Restrictions in the funding agency's appropriation act applicable to

[38] National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1073 and n.1 (D.C. Cir. 1983); Metcalf v. National Petroleum Council, 553 F.2d at 179 n.35.

[39] A FACA committee can thus be terminated by its establishing authority or by operation of law. The General Services Administration cannot abolish another agency's committee or refuse to recharter it. FACA § 7; B-127685-O.M., April 5, 1976. (To our knowledge, GSA has never tried to do so; the GAO memorandum refers to the Office of Management and Budget, whose FACA functions were later transferred to GSA.)

all funds appropriated in that act must generally be followed. B-222758, June 25, 1986 (Chemical Warfare Review Commission violated anti-lobbying provision in Defense Department appropriation act).[40] In addition, lobbying is not an advisory function. Id.

Most committees are funded in the manner described above—from the appropriations of a designated agency. Some are funded from one of the discretionary appropriations available to the President. For example, the so-called Warren Commission (Commission to Report Upon the Assassination of President John F. Kennedy) was funded from the "Emergency Fund for the President." Exec. Order No. 11,130 (1963). So was an earlier body, the Missouri Basin Survey Commission. Exec. Order No. 10,318 (1952). (The Emergency Fund was later redesignated "Unanticipated Needs.")

Some committees have mixed public-private funding. For example, the President's Commission on Executive Exchange received funding support from the Office of Personnel Management, and was also statutorily authorized to impose certain fees and to place them in a revolving fund in the Treasury. This made it necessary to determine whether a given expenditure was direct support or a general administrative expense. GAO concluded in one such case that a word processor and a postage machine were "direct support" expenses and therefore could be charged to the private-sector account, whereas reupholstering furniture and procuring commercial insurance for loaned works of art were administrative expenses chargeable to OPM funds. 63 Comp. Gen. 110 (1983).

Still other committees are intended to perform their functions at little or no cost to the government. An example here is President Reagan's Private Sector Survey on Cost Control in the Federal Government, the so-called Grace Commission. In setting up the Survey's executive committee, the President directed that it was "to be funded, staffed and equipped, to the extent practicable and

[40]We say "generally" because B-222758 is the easy case. More difficult would be the case, on which we have found no precedent or discussion, where a restriction would effectively make it impossible for the committee to do what it was set up to do.

permitted by law, by the private sector without cost to the Federal Government." Exec. Order No. 12,369, § 3(e) (1982).

A final funding approach should be noted, although it is not common. Congress can always choose to appropriate funds for a board or commission created by executive action, as it did, for example, in the case of the National Commission on the Observance of International Women's Year. See B-182398, March 29, 1976.

The Justice Department has held that a funding agency may not delegate the authority to obligate funds to an advisory committee, the obligation of funds being a non-advisory function. Relationship Between National Commission on Libraries and Information Science and Advisory Committee to White House Conference on Library and Information Services, Op. Off. Legal Counsel (February 12, 1990). (The committee in that case was statutory, but the point is more general.) This led to the question of the potential liability of the committee chairman, as an accountable officer, for the unauthorized expenditure. Because, under the particular facts of that case, the government incurred no loss, it was not necessary to address this issue. B-241668, February 19, 1991.

As in the case of Presidential committees, Congress may authorize a particular agency to create advisory committees, either specifically or in general terms. E.g., 10 U.S.C. § 5024 (Secretary of Navy authorized to appoint Naval Research Advisory Committee); 15 U.S.C. § 776 (general authority for Department of Energy advisory committees). Alternatively, an agency head can establish an advisory committee without statutory authority. The "establishing document" will vary with the agency's own system of internal directives. For example, the Attorney General has a numbered series of "Attorney General Orders," and used one of these to establish Law Enforcement Coordinating Committees. See 5 Op. Off. Legal Counsel 283 n.2 (1981). Whatever the precise mechanism, the establishment must be "determined as a matter of formal record" and published in the Federal Register. FACA § 9(a)(2). Other procedures are found in the GSA regulations. The committees are fully subject to the termination/renewal provisions of FACA § 14.

If Congress has the greatest latitude in funding options and the President has somewhat less, the individual agency has least of all.

When an agency creates an advisory committee, it has only one way to fund it—from its own pocket. The Energy Policy Task Force, for example, was created by the Department of Energy under authority of 15 U.S.C. § 776. GAO found it legitimate to pay the expenses of a task force meeting—specifically expenses of travel and recording a transcript—from the Secretary's salaries and expenses account. 60 Comp. Gen. 386, 397 (1981). As with Presidential bodies, the agency with more than one appropriation should choose the one most closely related to the committee's work, and expenditures may be made only for authorized purposes. It may be possible in some cases to obtain private funding. See, e.g., Metcalf v. National Petroleum Council, 553 F.2d at 180, noting that the National Petroleum Council, established by the Secretary of the Interior, was, apart from support services, "financed entirely from funds provided by the petroleum industry." (Wonder what they wanted?)

An advisory committee, presidential or agency, subject to FACA will generally not have to concern itself with the funding restrictions of 31 U.S.C. § 1346. A non-FACA body still must contend with them. Also, the Russell Amendment, 31 U.S.C. § 1347, does not apply to a FACA committee. In this connection, the Justice Department has said:

> "Whether or not one assumes that the Russell amendment was originally intended to apply to nonstatutory advisers or advisory groups, [FACA] has intervened. It has specifically authorized the creation of purely advisory committees; it has provided that they may have a 2-year life; and it has contemplated, and made provision for, the practice of using agency funds to support advisory committees. Accordingly, if indeed agency funds may otherwise be lawfully expended for such a purpose, there is no longer any reason, under the Russell amendment, to bar an expenditure of funds in support of an advisory committee merely because the committee has been in existence for more than 1 year." 3 Op. Off. Legal Counsel 263, 266-267 (1979).

That opinion also supports the conclusion that the Russell Amendment does not apply to purely advisory bodies, FACA or non-FACA. Of the various funding restrictions discussed earlier, the only one that would apply to a FACA committee (and alike to non-FACA bodies), as long as it remains in effect, is the requirement for specific approval for interagency funding.

In addition to the general funding statutes, there may be agency-specific laws which authorize or restrict agency activity in this area. For example, 22 U.S.C. § 2672 authorizes the State Department to fund the United States' participation in certain international activities. This was one of the statutes State relied on—properly, GAO found—to participate in funding the National Commission on the Observance of International Women's Year in the mid-1970s. See HRD-77-26, January 13, 1977, at 5-6 (GAO letter report). Section 2672 includes its own one-year restriction similar to the Russell Amendment. See B-202362, March 24, 1981.

(4) Donations

Given the ever-present pressure on Congress to hold down the costs of boards and committees, it is not uncommon for an enabling statute to authorize some level of private funding. Just as with any larger agency, a board or commission needs statutory authority to accept and use gifts or contributions. The reason, discussed in Chapter 6, is that without such authority the funds would have to be deposited in the general fund of the Treasury.

The statute will prescribe exactly what can be accepted. A common version in statutes creating boards or committees is the authority to "accept donations of money, property, or personal services." E.g., Pub. L. No. 98-375, § 7(a), 98 Stat. 1257, 1260 (1984) (Christopher Columbus Quincentenary Jubilee Commission); Pub. L. No. 85-305, § 5(a), 71 Stat. 626, 627 (1957) (Civil War Centennial Commission). The statute may go a step further and set a monetary limit on what can be accepted in a given year. E.g., Pub. L. No. 98-375, cited above, as amended by Pub. L. No. 100-94, § 4, 101 Stat. 700, 701 (1987); Pub. L. No. 98-101, § 5(h)(2), 97 Stat. 719, 721 (1983) (Commission on the Bicentennial of the U.S. Constitution). Both of these laws prescribe separate limits, one on gifts from individuals and a somewhat higher one on gifts from others such as corporations, partnerships, and foreign governments.

The statute will normally not define who can make the contributions, but there are exceptions, such as—

> "The Commission is authorized to receive funds through grants, contracts, and contributions from State and local governments and organizations thereof, and from nonprofit organizations." Pub. L. No. 89-733, § 6, 80 Stat. 1162 (1966).

The "Commission" refers to the Advisory Commission on Intergovernmental Relations. The provision was not so much a deliberate attempt to exclude individuals, but a desire to foster increased participation by those most directly affected by ACIR's work.

It should be apparent from the above statutory references that the authority to accept gifts occurs most often in statutes establishing operational bodies, most typically celebration/memorial commissions. As the ACIR provision shows, however, it can also appear with entities that are advisory.

The authority to accept gifts does not include the authority to solicit them. This is especially true because solicitation will almost invariably involve the use of other government funds, either for staff salaries and expenses or the procurement of some fund-raising capacity. E.g., B-211149, June 22, 1983. When Congress wants an entity to engage in solicitation, it specifically so provides in the gift acceptance provision. Examples are 36 U.S.C. § 2304 (Holocaust Memorial Council); 29 U.S.C. § 1513(e) (private industry councils under the Job Training Partnership Act); Pub. L. No. 98-101, 97 Stat. at 721, § 5(h)(1). In order to preclude questions of interpretation, it is always preferable for the statute to use the word "solicit" if that is desired. However, something less may suffice. For example, a statute which provided that nongovernment sources "shall be encouraged to participate to the maximum extent feasible . . . and to make contributions" has been construed as authorizing solicitation. 6 Op. Off. Legal Counsel 541, 544-546 (1982).

In most cases, donated funds are seen merely as an authorized supplementation of the commission's other funding sources. In some cases, however, there is a clear intent that the commission be funded in its entirety, or as close thereto as possible, from donated funds. For example, the statute creating the Martin Luther King, Jr. Federal Holiday Commission specified that "[a]ll expenditures of the Commission shall be made from donated funds." Pub. L. No. 98-399, § 7, 98 Stat. 1473, 1474 (1984). Similarly, the executive order creating the so-called Grace Commission directed that it be funded "to the extent practicable and permitted by law, by the private sector without cost to the Federal Government." Exec. Order No. 12,369, § 3(e) (1982). The requirement may be limited to certain of the commission's functions. E.g., 36 U.S.C. § 2304 (Holocaust Memorial Council may use only donated funds to construct museum). An interesting variation is the Railroad-Shipper Transportation Advisory Council, which is authorized to receive government funds and to solicit and use donations, but must "undertake best efforts to fund [its] activities privately" before making a request for federal money. Pub. L. No. 104-88, § 201(a), 109 Stat. 803, 939, codified at 49 U.S.C. § 726(d)(4).

Absent statutory authority to the contrary, donated funds must be deposited in the Treasury in a trust account, and are permanently appropriated for authorized uses. 31 U.S.C. § 1323(c). This means that they are available for expenditure without further legislation. B-90476, June 14, 1950. The fiscal and budgetary issues associated with federal "trust" funds are discussed in detail later in this chapter. It is important here to distinguish a trust account for donated funds from the more traditional fiduciary trust concept. See B-274855, January 23, 1997. Funds "held in trust," as those words are commonly used to describe a fiduciary relationship, are held for the benefit of another. Placing donated funds in a "trust account" is largely, although not necessarily, an accounting device to distinguish the funds from general funds and to assure that their use will be limited to the purposes for which they were given. Id.

The governing legislation may authorize a different treatment. The Holocaust Memorial Council provides one illustration. In response to a request from a congressional committee, GAO reviewed the legislative history of the Council's enabling statute and determined that, although the statute itself was silent, Congress intended a "no strings" treatment of donated funds. Accordingly, the Council could place donated funds in interest-bearing investments outside of the Treasury. B-211149, December 12, 1985. This case was applied and followed a few years later with respect to the Christopher Columbus Quincentenary Jubilee Commission. 68 Comp. Gen. 237 (1989). In B-211149, GAO recommended that the statute be amended to explicitly recognize the apparent intent, and 36 U.S.C. § 1407 was amended to provide that the Council's donated funds "are not to be regarded as appropriated funds and are not subject to any requirements or restrictions applicable to appropriated funds." See B-275959, May 5, 1998, confirming the earlier conclusion in light of the amendment. A similar amendment was not so important for the Columbus Commission because it was a temporary body with a specified termination date, whereas the Council's duration is permanent, or at least indefinite.

Authority broad enough to permit investing donated funds outside of the Treasury is also broad enough to authorize operations without regard to the statutes and regulations governing procurement by federal agencies. 68 Comp. Gen. at 239; B-211149, December 12, 1985, at 4. However, GAO declined to apply these cases to the American Battle Monuments Commission, a permanent entity, because it could find no comparable authority. B-275669.2, July 30, 1997.

Since title under a legal gift passes to the government, the donor has no claim for the refund of any unexpended balances upon termination of the board or commission. B-274855, January 23, 1997. Unless otherwise provided for by statute, the balances must be deposited in the Treasury as miscellaneous receipts. Id. A situation clearly warranting an exception is found in 36 Comp. Gen. 771 (1957). The Alexander Hamilton Bicentennial Commission thought it would be a good idea to use private funds to award scholarships to high school and college students, but it lacked the authority to accept donations. With this proposal in mind, Congress amended the Commission's enabling statute to authorize the acceptance of donations. The problem was that the Commission would almost surely go out of existence before the disbursement of funds could be completed. Under these circumstances, GAO concurred with the Commission's proposal to transfer, prior to its expiration, the balance of its donated funds to a "responsible private organization" in order to complete the administration of the scholarship awards. Id. Short of extending the Commission's life for the sole purpose of disbursing the rest of the funds, this was the best way to comply with the requirement of 31 U.S.C. § 1323(c) that the funds be disbursed in accordance with the terms of the "trust."

B. Government Corporations

1. Introduction: The Theory and the Controversy

The federal government has utilized the corporate device in various forms and contexts, for a long time. This usage has been studied probably as intensively as anything else in the federal realm. Although theory and practice often diverge, a theory of government corporations—albeit an unofficial one in the sense that it is not reflected in legislation—has emerged. In an often-cited passage, the Supreme Court said in a 1927 case:

> "[A]n important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States." United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927).

This points to two key features of the government corporation, at least the theoretical government corporation—commercial activities and freedom, to greater or lesser extent, from the laws that govern accountability of non-corporate government agencies to the Treasury.

Twenty years later, another often-cited document, President Truman's 1948 Budget Message, presented views on the proper standards for using the corporate device. A corporate form of organization, according to President Truman, is appropriate for the administration of governmental programs that (1) are predominantly of a business nature, (2) produce revenue and are potentially self-sustaining, (3) involve a large number of business-type transactions with the public, and (4) require greater flexibility than the customary type of appropriations budget ordinarily permits.[41] We see commercial activities and autonomy again, along with another important feature: revenue-producing activities of a type which would benefit from, or be facilitated by, revolving fund-type financing. While President Truman's position is often invoked as a guide in this area, it has never become law and is not always followed.

Although there is no clear and universally accepted standard, it can be seen from the preceding paragraphs that the corporate device is something the government has turned to when it wants to do something that, for the most part, resembles a business enterprise. The practice has, however, engendered some controversy. As a

[41]Budget Message of the President, U.S. Congress, H.R. Doc. No. 80-19, at M61 (1948), cited in, e.g., Ronald C. Moe, CRS, Managing the Public's Business: Federal Government Corporations, S. Prt. No. 104-18, at 7-8,(1995) (hereafter Moe 1995).

matter of fact, Dr. Harold Seidman, a leading expert in the field, calls the government corporation "one of the most controversial institutional innovations of our time."[42] At one extreme are advocates of the government corporation who view it "with almost religious devotion" and regard it "as a desirable end in itself, regardless of the purpose which it serves."[43] Those at this extreme are driven by what another writer terms a "cultural bias" that anything the private sector does is automatically and inherently "better" than anything the public sector does.[44] For example, Marshall Dimock, one of the government corporation's most ardent early supporters, wrote:

> "It is a tribute to the potential business efficiency inherent in the corporate device that government reliance upon the public corporation has tended to increase with the extension of state trading. Statesmen have realized that bureaucratic influences inhering in a system of central control and integrated administration are difficult to reform. . . . [N]ational legislators have more and more turned to the autonomous device, the public corporation. They have said, in effect, 'Let us use the same kind of legal entity, freedom of management, and independence of finance which contribute to the success of the best-managed private enterprises.' It is an argument that is hard to answer."[45]

Opponents of the government corporation have been no less short on rhetoric.[46] One early critic went so far as to write that "there is no place in our constitutional government for the performance of governmental functions by means of corporations."[47]

[42]Harold Seidman, The Theory of the Autonomous Government Corporation: A Critical Appraisal, 12 Pub. Admin. Rev. 89, 90 (1952) (hereafter Seidman 1952).

[43]Id.

[44]Francis J. Leazes, Jr., Accountability and the Business State: The Structure of Federal Corporation 4 (Praeger Publishers, 1987) (hereafter Leazes).

[45]John McDiarmid, Government Corporations and Federal Funds, at xiii (Univ. of Chicago Press, 1938) (introduction by Marshall E. Dimock).

[46]"My God, Senators! Stand up for your rights, and stand up for your country before it is too late, and . . . do away with these corporations that are going to make the United States of America a United States of Russia!" 79 Cong. Rec. 4051 (1935) (Sen. Schall).

[47]O. R. McGuire, Government by Corporations, 14 Va. L. Rev. 182, 186 (1928).

Most reasoned analyses tend to avoid the extremes and focus instead on how the corporate device works or has been used in specific contexts. For example, Dr. Ronald C. Moe, one of the government's leading experts on government corporations, has noted that several government corporations "perform no commercial functions" and that—

> "Several of the new breed of corporations were created specifically to escape certain government-wide administrative, budgetary and personnel requirements, not because incorporation as a separate legal entity was necessary for their mission."[48]

Another common criticism is the corporation's lack of accountability. If a corporation is given a revolving fund, freedom from the fiscal laws governing other agencies, and perhaps even off-budget status, its accountability to Congress is minimal. In addition, as some analysts have pointed out, corporate autonomy can also diminish accountability to the President and weaken executive branch management.[49] While all supporters of the government corporation seem to laud freedom from accountability to Congress, some favor the escape from presidential control as well.[50]

In 1980, the Office of Management and Budget contracted with the National Academy of Public Administration (NAPA) to produce a report on existing government corporations and to make policy recommendations for future creation of corporations. Breaking out "enterprises" as a separate category, and mindful of the imprecision of definitional attempts, the report broadly defined "government corporation" as "a government entity created as a separate legal person by, or pursuant to, legislation," with the powers to "sue and

[48]Ronald C. Moe, CRS No. 83-236GOV, Administering Public Functions at the Margin of Government: The Case of Federal Corporations, 24 (1983) (hereafter Moe 1983). See also, Is the Administrative Flexibility Originally Provided to the U.S. Railway Association Still Needed?, GAO/CED-78-19 (February 22, 1978).

[49]E.g., A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543, 607-613 (1995); Ronald C. Moe, Government Corporations and the Erosion of Accountability: The Case of the Proposed Energy Security Corporation, 39 Pub. Admin. Rev. 566, 568 (1979).

[50]E.g., Marshall E. Dimock, Government Corporations; A Focus of Policy and Administration (Part II), 43 Am. Pol. Sci. Rev. 1145, 1149 (1949), summarized in Seidman 1952, supra note 42, at 94-95.

be sued, use and reuse revenues, and own assets."[51] While NAPA was basically supportive of the concept of the government corporation, it weighed in on the side of accountability and management control. The report recommended a set of eight "basic principles" which some view as fairly restrictive and which have been, in effect, honored more in the breach by both the executive and the legislative branches of the federal government. They are:

"1. All government enterprises and corporations should be agencies of the United States.

"2. All administrative and operational functions of the federal government should be performed by agencies of the United States located in the Executive branch.

"3. Although different organizational forms and powers and administrative flexibility are required for the effective performance of different government functions, all Executive organizations should be accountable to the President, duly appointed officials and the Congress.

"4. The officers and employees of government enterprises and corporations (other than mixed-ownership corporations intended for eventual private ownership) should be employees of the United States.

"5. A government corporation should normally be placed under the head of an existing department or agency rather than established as an independent Executive agency.

"6. No government corporation should create a subsidiary without approval of Congress.

"7. Financial transactions of all government corporations should be included in the federal budget.

"8. Corporations expected to be profit-making should be established in the private sector, and government corporations should be self-sustaining or potentially self-sustaining."[52]

[51]National Academy of Public Administration, I Report on Government Corporations 21 (1981) (hereafter NAPA 1981).

[52]Id. at iii-iv (Executive Summary), cited in Moe 1995, supra note 41, at 16.

The NAPA report also emphasized that "[t]he burden of proof for justifying exemptions from these principles should rest with the advocates of such exemptions."[53]

Because of its inherent institutional bias in favor of congressional control, GAO has also weighed in on the accountability side of the ledger. In commenting over the decades on numerous legislative proposals to create new corporations, GAO has recognized that corporations in some cases "may be necessary and valuable means of conducting the public business." B-96983, August 15, 1950. However, it has also expressed a clear preference for the normal budget and appropriations process and the fiscal requirements which flow from that process, and has argued that departures from the standard should be permitted only upon a clear showing that there is some valid programmatic reason for doing so—apart from a desire to be exempt from fiscal and regulatory laws. E.g., B-127124, April 10, 1973; B-160803, February 10, 1967. GAO has also used the "Truman criteria" in assessing the appropriateness of the corporate form. E.g., B-94958, May 23, 1950.

Another point made in various GAO comments is that the need for flexibility does not necessarily require corporate status. Congress can legislatively provide the desired degree of flexibility to any agency. "[B]udgeting, accounting, and reporting may be designed to suit the individual and particular needs of any activity under any method of financing." B-120047, July 17, 1961, at 3. This is related to a point Seidman and Moe have made: Use of the term "corporation" is perhaps unfortunate and confusing because it tends to bring in the entire range of private-sector concepts, some of which are not necessary or simply do not fit when implementing a government program.[54]

Largely because each corporation is the creature of its enabling legislation, there is no single legally recognized model for the government corporation. As Leazes puts it:

[53] Id.

[54] Seidman 1952, supra note 42, at 93; Moe 1983, supra note 48, at 3.

"Federal corporations should not be treated as if they constitute a single class of organizational type. Virtually all are unique creatures, and . . . what is distinctive about them as a group is that each embodies its own calculated mixture of public and private elements and of financing and controls, and each is a result of a particular congressional enactment after extensive controversy over rival policies and interests."[55]

The fact that "[n]o two Federal Government corporations are completely alike"[56] underscores the importance of the enabling legislation. A government corporation (and this is true of any agency as well) "possesses only those powers which are enumerated in the act of Congress creating it."[57] This of course includes any other legislation specifically made applicable. The governing legislation determines the body's powers and functions, its financial arrangements, and its degree of operating flexibility. As Dr. Moe has stated:

"Because there is no general incorporation law defining government corporations, Congress is free to call any entity a 'corporation' and assign to this corporation whatever characteristics it chooses."[58]

Or, as the court in United States v. Nowak, 448 F.2d 134, 138 (7th Cir. 1971), put it:

"If it chooses to make use of a 'corporation,' Congress is not limited by traditional notions of corporate powers and organization but may mold its vehicle in any way which appears useful to the accomplishment of the legislative purpose."

Notwithstanding this susceptibility to variation, it is possible to identify the major characteristics of government corporations. (Apart from the requirement for a legislative charter, none of these rises to the level of a rule of law.) A government corporation is generally (1) a federally chartered entity (2) created to serve a public function (3) of a predominantly business nature. Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14, at 1 (December 1995). Most, but not all, have been

[55]Leazes, supra note 44, at 7.

[56]Moe 1995, supra note 41, at 47.

[57]Seidman 1952, supra note 42, at 93.

[58]Moe 1983, supra note 48, at 33.

created to carry out business-type programs that are thought to need a high degree of autonomy and flexibility. Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 1 (April 6, 1983). Consequently, they are not subject to all of the federal statutes or regulations generally applicable to government agencies. Government corporations may be independent or subject to significant federal control as part of a government department or agency.[59] They may or may not have a board of directors, although most do, and may have board members who are named government officials, such as the head of an agency, or board members who are appointed by the President. Many government corporations are either fully or partially funded by the federal government, but may also have authority to raise and collect revenue from other sources consistent with their business-type operations. Congress has authorized other government corporations to issue obligations backed by the full faith and credit of the United States. The theory is that the operational and financial flexibility given to a government corporation allows it to respond more quickly to changes in the marketplace and to take advantage of cost-saving opportunities. Id. at 1.

It is also possible to identify several powers common to most government corporations:

> "With some minor variations, government corporations can sue and be sued; acquire property in their own name; use their revenues; obtain funds either by borrowing from the Treasury or from revolving funds, instead of by securing annual appropriations; and determine the character and necessity of their expenditures and the manner in which they are incurred, allowed, and paid, subject to laws specifically applicable to government corporations rather than to general statutes controlling the expenditure of public funds. These are the vital ingredients which give a government corporation its distinctive character and without which it cannot operate successfully."[60]

While the 20th century proliferation of government corporations has stemmed largely from the perceived attractiveness of the private-sector corporate model, the analysts caution against taking the analogy too far. In this connection, Seidman points out:

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[59] E.g., Moe 1983, supra note 48, at 36-39.

[60] Seidman 1952, supra note 42, at 93-94.

"While government and private corporations in the United States do possess certain common characteristics, there are and always have been fundamental differences. Both have a legal personality, can sue and be sued, and generally have boards of directors. Here the resemblance ends. Private corporations, with the obvious exceptions, are organized for profit and the corporate form is utilized primarily to take advantage of limited liability, pooling of investment, transferability of securities, and perpetuity. These benefits are of little or no significance for a government corporation."[61]

And, one more factor cannot, or at least should not, be ignored:

"Public funds (tax dollars), after all, are not freely given in voluntary market exchange for goods and services; they are legally confiscated from citizens, by force if necessary. . . . At this level . . . the private and governmental sectors are fundamentally different. It is for this reason that the standards for governmental control and enforced adherence to prescribed processes and procedures are—and have to be—so much higher than those of the private sector."[62]

GAO, in part because it used to be responsible for auditing government corporations, has conducted periodic surveys of the activities and financing of all existing government corporations. The earliest edition, called the Reference Manual of Government Corporations, was prepared in 1944 primarily for internal GAO use. It was reissued for more general use in 1945. S. Doc. No. 79-86 (1945). A 1985 edition was entitled Reference Manual of Corporations Authorized or Established by the Congress. It wasn't very long before the title was changed again: In 1988, Profiles of Existing Government Corporations was issued as GAO/AFMD-89-43FS (December 1988) and as a committee print of the House Committee on Government Operations. It was updated and reissued in December 1995 with the report designation GAO/GGD-96-14. Since corporations come and go over time, and provisions for their governance and financing may change, each edition of the Manual/Profiles is useful at least for historical purposes and contains material not found in the others. See, e.g., Lebron v.

[61] Id. at 93.

[62] Ronald C. Moe and Robert S. Gilmour, Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law, 55 Pub. Admin. Rev. 135, 143 (1995). Elsewhere, Moe attributes to Wallace Sayre the quip that "the public and private sectors are alike in the nonessentials, differing only in the essentials." Moe 1995, supra note 41, at xiii.

National R.R. Pass'r Corp., 513 U.S. 374, 387, 395 (1995) (citing the 1945 edition).

2. The Problem of Definition

a. Government Corporations

In our preceding discussion of miscellaneous boards and committees, we noted at the outset the lack of a commonly accepted working definition. That lack is equally prominent in the case of government corporations. Dr. Moe has noted:

> "There is at present no universally accepted definition of what constitutes a government corporation, hence there are several listings of government corporations, each different and based upon the definition employed by the compiler."[63]

GAO has also pointed out the lack of a uniform definition. Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 8 (April 6, 1983). Definitions found in the United States Code serve only limited purposes. For example, 5 U.S.C. § 103(1) defines the term, but only for purposes of Title 5, as "a corporation owned or controlled by the Government of the United States." Title 31 also has what amounts to a definition by virtue of including the word "instrumentality" in its definition of agency. 31 U.S.C. § 101. The chief (and only) government-wide regulatory statute, the Government Corporation Control Act, fails to include a definition but merely lists the entities covered.

As we have seen, one approach is to try to identify common attributes. One account identifies some of these attributes as "a public purpose, a federal government charter, some form of government supervision, and a public subsidy."[64] While this is useful in establishing a conceptual direction, it suffers when you break it down to the working level. If, for example, one equates "charter"

[63]Moe 1995, supra note 41, at xii. For virtually identical comments, see John T. Tierney, Government Corporations and Managing the Public's Business, 99 Pol. Sci. Q. 73, 76 n.6 (1984), and Moe 1983, supra note 48, at 5.

[64]Leazes, supra note 44, at 18. Leazes also adopts the definitional approach of the Government Corporation Control Act by specifically identifying, by name, the entities he includes under his government corporation aegis. Id. at 9-10.

with "enabling legislation"—and it is beyond question that the charter of a government corporation is its enabling legislation—the attributes apply equally to any government agency. Similarly, we previously noted a statement from a GAO report that government corporations "are generally federally chartered entities created to serve a public function of a predominantly business nature." GAO/GGD-96-14, at 1 (December 1995). This again shows the hazard of generalization, saved by the fortunate inclusion of the word "generally," since some government corporations perform only governmental functions.

Neither is it useful to construct a classification based on the mere presence or absence of the word "corporation" in the entity's name. An old state court case, considering the application of sovereign immunity to a state-created corporation, put it this way:

> "It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the legislature may call it." Gross v. Kentucky Bd. of Mgrs., 49 S.W. 458, 459 (Ky. Ct. App. 1899).

Acknowledging that any classification is imperfect and open to debate, we, for purposes of this discussion, are concerned primarily with the following categories:

1. Entities subject to the Government Corporation Control Act. We say "entities" because they may or may not be in actual corporate form, although they usually are, and their names may or may not include the word "corporation." The Control Act subdivides covered entities into two groups discussed in detail later—wholly owned government corporations and mixed-ownership government corporations.

2. Corporations created and fully or substantially funded by the United States Government, but not subject to the Control Act. Examples include the Legal Services Corporation and the Corporation for Public Broadcasting.[65]

[65]The Corporation for Public Broadcasting has strenuously objected to being included under any "government corporation" umbrella. See NAPA 1981, supra note 51, at Appendix 3. We include it under our umbrella listing because (1) it was statutorily created as a corporation and (2) it spends federal money.

3. Entities created, and at least partially funded, by the federal government which are not designated as corporations but which have comparable powers, and are also at least partially exempt from the Control Act. Examples include the United States Postal Service, the Smithsonian Institution, and the Bonneville Power Administration.[66] (The main difference between this group and group 2 is that the legislation creating a group 3 entity does not confer corporate status on it. Of course, other differences flow from that distinction.)

The above groups, taken together, comprise our "definition" for purposes of this discussion.

b. Government-Sponsored Enterprises

Although not a major focus of this section, we will, in addition to the categories noted above, occasionally refer to the "government-sponsored enterprise." The term "government-sponsored enterprise" (GSE) refers to a "privately owned and operated federally chartered financial institution that facilitates the flow of investment funds to specific economic sectors."[67] A conceptually similar but more detailed definition is found in the Congressional Budget Act, 2 U.S.C. § 622(8). GSEs are, largely but not exclusively, those entities with names that "sound like those of aging singers or the latest fast-food sandwich"[68]—Fannie Mae, Farmer Mac, etc. As always, there are exceptions. For example, the Government National Mortgage Association—"Ginnie Mae"—is a wholly owned government corporation. 31 U.S.C. § 9101(3)(G). Also, the status of some entities is debatable. Some contended, for example, that the original College Construction Loan Insurance Corporation—

[66]The Bonneville Power Administration is a true hybrid. It is not a government corporation although it has many of the powers of one and operates from a revolving fund. It is subject to the budget, but not the audit, provisions of the Corporation Control Act. See 16 U.S.C. §§ 832a, 838i. Our discussion does not further address the Postal Service or the Smithsonian, which the Supreme Court has called "the oldest surviving government corporation." Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391 (1939).

[67]A Glossary of Terms Used in the Federal Budget Process: Exposure Draft, GAO/AFMD-2.1.1, at 49 (Rev. January 1993) (hereafter cited as Budget Glossary Exposure Draft).

[68]Lori Nitschke, Private Enterprise With Official Advantages, 56 Cong. Q. Wkly. 1578 (1998).

"Connie Lee"—was not a GSE because it was partly government-owned; others included it.[69]

Another not too different definition is:

"A GSE is a privately owned, federally chartered, financial institution with nationwide scope and specialized lending powers that benefit from an implicit federal guarantee to enhance its ability to borrow money."[70]

Legislation creating GSEs has not used the same terminology. Farmer Mac is a "federally chartered instrumentality of the United States." 12 U.S.C. § 2279aa-1(a)(1). So is the Financial Assistance Corporation. 12 U.S.C. § 2278b. Fannie Mae is a "Government-sponsored private corporation." 12 U.S.C. § 1716b. Freddie Mac is simply a "body corporate." 12 U.S.C. § 1452(a). Some have suggested that the legal status of GSEs has been kept intentionally ambiguous.[71]

For purposes of comparing GSEs with other forms of government-created corporations, the important points are that (1) GSEs are regarded as privately owned (which, in some cases and depending on how one frames one's definition, may be only partially true);

[69]Compare Ronald C. Moe and Thomas H. Stanton, Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability, 49 Pub. Admin. Rev. 321, 328 n.8 (1989) (Connie Lee not a GSE), with Carrie Stradley Lavargna, Government-Sponsored Enterprises Are 'Too Big to Fail': Balancing Public and Private Interests, 44 Hastings L.J. 991, 999 n.40 (1993) (Connie Lee included as GSE). Congress took action in 1996 to terminate the federal ownership and completely "privatize" Ms. Lee. See 20 U.S.C. § 1155.

[70]Thomas H. Stanton, Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises, 5 Admin. L.J. 395, 401 (1991); Moe and Stanton, supra note 69, at 321.

[71]Moe and Stanton, supra note 69, at 321, concurring with Harold Seidman, The Quasi World of the Federal Government, 6 Brookings Rev. 23 (1988) (hereafter Seidman 1988).

(2) they are financial institutions;[72] and (3) they are supervised but not directly managed by the government.[73] Summary information on a number of GSEs may be found in GAO's Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991). GSEs are subject to audit by GAO only if specifically provided by statute. B-114828, November 25, 1975, at 2.

GAO has issued detailed reports on the government's exposure to risks stemming from its use of GSEs. See Government-Sponsored Enterprises: The Government's Exposure to Risks, GAO/GGD-90-97 (August 1990); Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks, GAO/GGD-91-90 (May 1991). In 1992, Congress enacted the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. ch. 46, to provide a measure of federal supervision and regulation over Fannie Mae and Freddie Mac. The law established an Office of Federal Housing Enterprise Oversight whose job it is to see that Fannie and Freddie are adequately capitalized and operating safely. 12 U.S.C. §§ 4502(6), 4511, 4513(a).

While a GSE is, except as expressly provided, not subject to the laws governing federal agencies, it is nevertheless a creature of statute and exists to perform only those functions assigned to it in its enabling legislation. Any activity it undertakes must directly relate to the performance of one or more of those specified functions. Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) (national bank may not operate a full-scale travel agency); Association of Data Processing Service Organizations v. Federal Home Loan Bank Board, 568 F.2d 478 (6th Cir. 1977) (federal home loan banks not

[72]A broader definition could include entities like the Corporation for Public Broadcasting. E.g., Lloyd D. Musolf and Harold Seidman, The Blurred Boundaries of Public Administration, 40 Pub. Admin. Rev. 124, 125 (1980). Most subsequent definitions, however, including one by the Office of Management and Budget, incorporate the financial institution element. See Government Corporations, OMB Memorandum No. M-96-05, App. I (December 8, 1995) (definition very similar to Moe/Stanton definition quoted in the text).

[73]Moe and Stanton, supra note 69, at 323-324, define "instrumentality" as "a privately owned institution that is supervised but not directly managed by the government," although they acknowledge the lack of a statutory definition.

authorized to sell on-line data processing services to member institutions);[74] 71 Comp. Gen. 49 (1991) (Farmer Mac is authorized to guarantee the timely payment of principal and interest on certain mortgage-backed securities, but is not authorized to purchase those securities). The decision stressed that a statute's purpose clause is not an independent grant of authority. 71 Comp. Gen. at 52.

c. Federally Chartered Corporations

This group consists of the 80-plus corporate entities whose charters comprise Title 36 of the United States Code, Subtitles II and III.[75] Among the best-known examples are the American Red Cross,[76] American Legion, and the United States Olympic Committee. Each entity occupies its own chapter in Title 36, and each is designated a "body corporate and politic" or a "federally chartered corporation." In addition, a provision no longer in the Code used the term "private corporations established under Federal law."[77] Of course this terminology can apply equally to GSEs. The difference is that the Title 36 corporations are not "business corporations;" they are patriotic, fraternal, or charitable associations. The federal charter is viewed as a mark of prestige. The primary purpose of granting it is "to bestow public honor and recognition on the works of the organization." Girl Scouts v. Personality Posters Mfg., 304 F. Supp. 1228, 1232 (S.D.N.Y. 1969).

Although there is variation, the statutory charters "follow a common pattern."[78] The typical charter starts by identifying the incorporators by name and declaring their corporate status. The

[74]The federal home loan banks are usually included as GSEs. E.g., GAO/AFMD-91-17 at 14. They are also identified as mixed-ownership government corporations. 31 U.S.C. § 9101(2)(C).

[75]Apart from this overview treatment and a brief mention later in connection with state and local taxes, our discussion does not further address these entities.

[76]While commonly known as the American Red Cross, or more simply as the Red Cross, this organization's proper name is really "The American National Red Cross." 36 U.S.C. § 300101(b)

[77]36 U.S.C. § 1101 (1994 ed.). Title 36 was recodified in August 1998 by Pub. L. No. 105-225, 112 Stat. 1253. The former section 1101 was omitted as unnecessary. In addition, the American Red Cross was given its own subtitle, subtitle III, as a "treaty obligation organization."

[78]Wesley A. Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1, 23 (1957).

incorporators range from a few to several dozen. (The recodification dropped the individual names as executed and unnecessary.) The statute may be creating a new organization, or it may merely be giving a federal charter to an organization already chartered under state law. The statute will then state the corporation's purposes and outline its general powers. A typical "powers" provision will include such things as sue and be sued, adopt and use a corporate seal, adopt by-laws, hold and convey property, and enter into contracts. E.g., 36 U.S.C. § 152305 (National Music Council).[79]

Most have perpetual succession, a feature common to private business corporations. E.g., 36 U.S.C. § 30502(c) (Blue Star Mothers of America). A relatively few have limited duration. For example, the Grand Army of the Republic, chartered in 1924 but in existence long before, consisted of those who had served in the United States armed forces during the Civil War and were honorably discharged. The charter provided that the corporation would terminate when the last of its members died. Act of June 3, 1924, ch. 242, § 6, 43 Stat. 358, 360. This of course happened some time ago, and the charter is no longer carried in the U.S. Code.

A common provision prohibits the corporation from issuing stock or paying dividends. E.g., 36 U.S.C. § 22307(a) (American Symphony Orchestra League). Some go a step further and explicitly prohibit activities for pecuniary profit. E.g., 36 U.S.C. § 152307(a) (National Music Council). Although this language is infrequent, it seems clear based on the stated purposes of these corporations[80] that, even in its absence, the corporation is not intended to operate on a for-profit

[79]Our choice of examples is intended to convey some idea of the types and range of organizations Title 36 encompasses.

By the way, in case you find our citation to 36 U.S.C. § 152305 for the National Music Council (as well as those for the other organizations in this discussion) a bit odd, rest assured that it is correct. The section numbers in title 36 of the U.S. Code go rather higher than seems normal for the Code—up to section 300,111, at the writing of this chapter, to be precise.

[80]E.g., 36 U.S.C. §§ 20302 (American Academy of Arts and Letters—furthering the interests of literature and the fine arts); 20903 (American ex-prisoners of war—encouraging fraternity, fostering patriotism, maintaining historical records); 21302 (American Historical Association—promoting historical studies collecting and preserving historical manuscripts); 21003 (American GI Forum of the United States—educational, patriotic, civic, historical, and research organization).

basis. Several charters provide for termination if the corporation loses its tax-exempt status under the Internal Revenue Code. E.g., 36 U.S.C. § 70108(b) (Fleet Reserve Association).[81]

Another common provision prohibits the corporation or its officers or members from engaging in political activities. E.g., 36 U.S.C. § 23106(b) (Aviation Hall of Fame). At least one variation includes a prohibition on attempting to influence legislation. 36 U.S.C. § 150108(b) (National Academy of Public Administration).

The charter will typically give the corporation the sole and exclusive use of its name. E.g., 36 U.S.C. § 50305 (Disabled American Veterans). The exclusivity may extend to other symbols and emblems as well. E.g., 36 U.S.C. § 220506(a) (Olympic symbol of five interlocking rings).

For the most part, Title 36 corporations do not receive federal funds. A few do or, at least, are explicitly authorized to seek federal grants, reimbursements, or other kinds of "support." The United States Olympic Committee, for example, can apply for grants from the Department of Commerce. 36 U.S.C. § 384 (1994 ed.).[82] The National Film Preservation Foundation is authorized to receive up to $250,000 a year from the Library of Congress, to be used only to match private contributions and not for administrative expenses. 36 U.S.C. § 151711. The National Academy of Public Administration is required to study and report on "any subject of government" when requested by any branch of the federal government, to be paid for from appropriated funds available to the requestor. 36 U.S.C. § 150104. See also 36 U.S.C. § 150303 (similar provision for National Academy of Sciences). Even in these instances, appropriated funds are only a portion, substantial though it may be, of the corporation's

[81]The source provision, 36 U.S.C. § 5613 (1994), explicitly stated that the charter "shall terminate" if the association fails to maintain its tax-exempt status, language omitted from the recodification in favor of general language prescribing expiration for noncompliance with any charter provision. 36 U.S.C. § 70102(b).

[82]The recodification dropped this provision as "obsolete" because Congress authorized the grants in 1980 and none were ever made. See H.R. Rep. No. 105-326, at 305 (Table 2A) (1997). Since the funds appropriated for this remain available until expended and the authorization contains no expiration, we see no reason the authority could not be used in the future. See Pub. L. No. 95-482, 92 Stat. 1603, 1606 (1978) (authorization); Pub. L. No. 96-304, 94 Stat. 857, 898 (1980) (appropriations.)

revenue. In no case is a Title 36 corporation funded entirely by direct federal appropriations.[83] In a few instances, federal agencies are authorized to provide logistical support. E.g., 36 U.S.C. §§ 70909 (Department of Education authorized to make available "personnel, services, and facilities" to the Future Farmers of America); 220107 (Defense Department authorized to make its resources available to United Service Organizations).

Most of the revenue of these corporations comes from donations and, in some cases, membership fees. Some of the corporations are expressly authorized to engage in income-producing (but not profit-making) activities. E.g., 36 U.S.C. § 220305(7) (United States Capitol Historical Society may sell commemorative medals and other souvenir items); 36 U.S.C. §§ 40703(5), 40732 (Corporation for the Promotion of Rifle Practice and Firearms Safety may charge user fees and may sell surplus rifles). Those without such specific authority could probably engage in limited income-producing activities under their general corporate powers.

Some Title 36 charters include their own audit requirements. The American Red Cross, for example, must prepare an annual itemized report of receipts and expenditures, which is audited by the Department of Defense, and must reimburse the expenses Defense incurs in conducting these audits. 36 U.S.C. § 300110. Title 36 corporations whose charters do not include audit provisions are subject to the general requirements of 36 U.S.C. § 10101, subsection (a) of which requires an annual audit "in accordance with generally accepted auditing standards" by independent accountants. Subsection (b) requires submission of audit reports to Congress, supplemented "in reasonable detail" by a statement of income and expenses including the results of any commercial-type activities. GAO does not audit these corporations. It does, upon request, conduct a limited "report audit," including a review of the corporation's financial statements, to determine whether the audit report complies with the financial reporting requirements of the

[83] Title 36 includes two entities substantially supported by appropriated funds—the American Battle Monuments Commission (36 U.S.C. ch. 21) and the United States Holocaust Memorial Council (id. ch. 23). While placed in Title 36, these are not corporations and are thus not included in the concept of "Title 36 corporations" discussed in the text. Recognizing the essential differences, the recodification separated these from the rest and placed them in Subtitle I, Part B.

statutory charter or 36 U.S.C. § 10101. GAO's report of this review is very brief and, if no problems are found, concludes simply that "nothing came to our attention that would cause us to believe that the financial reporting requirements of the law have not been met." E.g., GAO/AIMD-98-177R, June 12, 1998 (Little League Baseball, Inc.).

The relationship of a Title 36 corporation to the federal government cannot be summarized in a simple statement. Several charters provide that the corporation "may not claim congressional approval or the authority of the United States Government for any of its activities." E.g., 36 U.S.C. §154708(d) (Non-Commissioned Officers Association of America). Others include a more explicit federal disclaimer provision:

> "The United States Government is not liable for any debts, defaults, acts, or omissions of the corporation. The full faith and credit of the Government does not extend to any obligation of the corporation." 36 U.S.C. § 151310 (National Fallen Firefighters Foundation).

For another example, see 36 U.S.C. § 151710 (National Film Preservation Foundation).

Absent an explicit disclaimer provision, the question becomes whether the corporation can be deemed a "federal actor" or an instrumentality of the United States, and if so, for what purposes. The starting point in this analysis is the established proposition that the mere fact that Congress has conferred a federal charter does not make the corporation a government agent. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 543 (1987); Stearns v. Veterans of Foreign Wars, 394 F. Supp. 138, 141 (D.D.C. 1975), aff'd mem., 527 F.2d 1387 (D.C. Cir. 1976). In many cases this will provide the answer as there is no, or at least no significant, federal involvement beyond the granting of the charter and the requirement to submit annual reports to Congress. If this does not do the job, it becomes necessary to undertake "further examination of the nexus between the [corporation] and the Government." Stearns v. Veterans of Foreign Wars, 500 F.2d 788, 790 (D.C. Cir. 1974). Unfortunately, "there is no simple test" for doing this. Department of Employment v. United States, 385 U.S. 355, 358 (1966).

If the corporation with no federal involvement beyond its charter is one extreme, the American Red Cross is arguably the other. It has certainly generated the lion's share of cases. The Supreme Court has held that the Red Cross is an instrumentality of the United States, at least for purposes of immunity from state taxation of its operations. Department of Employment v. United States, 385 U.S. at 358-359. Among the factors the Court found relevant are (1) the provision for audit by the Defense Department, (2) presidential appointment of the principal officer and several governors, and (3) the receipt of "substantial material assistance"—not the least of which is a permanent headquarters building—from the federal government. Id. at 359.

The lower courts have considered the "instrumentality" status of the Red Cross in a variety of contexts. For example, the Red Cross cannot be required to pay state or local taxes on authorized gambling activities (such as bingo games). United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990). Its employees share federal employees' limited immunity from personal liability. Barton v. American Red Cross, 829 F. Supp. 1290 (M.D. Ala. 1993), aff'd mem., 43 F.3d 678 (11th Cir. 1994). However, the Red Cross is not an "agency" of the government for purposes of the Freedom of Information Act. Irwin Memorial Blood Bank v. American National Red Cross, 640 F.2d 1051 (9th Cir. 1981). Nor is it an "instrumentality" for purposes of the (later held unconstitutional) Religious Freedom Restoration Act. Hall v. American National Red Cross, 86 F.3d 919 (9th Cir. 1996). Nor is it covered by the Federal Tort Claims Act (see below).

On some issues regarding the Red Cross, the courts are in disagreement. One is the right to trial by jury. Some courts, treating the Red Cross more like a private party, have held that parties in civil litigation against the Red Cross are entitled to a jury trial. E.g., Marcella v. Brandywine Hospital, 47 F.3d 618 (3d Cir. 1995); Doe v. American National Red Cross, 847 F. Supp. 643 (W.D. Wis. 1994). Others, placing the Red Cross more on the instrumentality side of the ledger, have found jury trial unavailable. E.g., Barton v. American Red Cross, 826 F. Supp. 412 (M.D. Ala. 1993), aff'd mem., 43 F.3d 678 (11th Cir. 1994). Another issue is the award against the Red Cross of punitive damages (available against private litigants but not the United States). Some courts have said "yes" to such awards. Doe v. American National Red Cross, 845 F. Supp. 1152 (S.D. W.Va. 1994).

Others have held that the Red Cross shares the government's immunity from punitive damage awards. Barton v. American Red Cross, 826 F. Supp. 407 (M.D. Ala. 1993), aff'd mem., 43 F.3d 678 (11th Cir. 1994); Doe v. American National Red Cross, 847 F. Supp. at 648-649; Doe v. American National Red Cross, 837 F. Supp. 121 (E.D.N.C. 1992).

There are relatively few cases involving Title 36 corporations other than the Red Cross. The court in United States v. District of Columbia, 558 F. Supp. 213 (D.D.C. 1982), vacated as moot, 709 F.2d 1521 (D.C. Cir. 1983), followed the Red Cross precedent and found the U.S. Capitol Historical Society to be an instrumentality of the United States for purposes of tax immunity. Among the facts the court thought relevant were that the Society receives rent-free space in the Capitol to operate a visitor's center (see 40 U.S.C. § 831), and that its charter expressly prohibits any of the Society's funds from inuring to the benefit of its members (36 U.S.C. § 220308(b)). The judgment was vacated on appeal because Congress passed legislation giving the Society tax-exempt status. See 36 U.S.C. § 220307.

In the Stearns litigation cited above, the court held that the Veterans of Foreign Wars was not a "government actor" for purposes of the anti-discrimination protections of the Fifth Amendment. The Supreme Court reached the same conclusion (although far from unanimously) with respect to the United States Olympic Committee. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987). Reaffirming that the mere fact of federal incorporation is not enough, the Court further emphasized that "[e]ven extensive regulation by the government" or the existence of a federal subsidy may not be enough. Id. at 544. It thus appears likely that few, if any, of the other Title 36 corporations would achieve the same level of "instrumentality" as the Red Cross.[84]

A charitable and benevolent corporation which operates without assistance or interference from the government is not a government

[84]One possibility is the Corporation for the Promotion of Rifle Practice and Firearms Safety, 36 U.S.C. ch. 407, because it was created to take over a program formerly administered by the Department of the Army, but there are no cases. Another is the U.S. Capitol Historical Society (see United States v. District of Columbia, cited in the text, discussing the Society's "governmental functions").

agency for purposes of the dual compensation laws, even though government officials may be involved it its administration. 26 Comp. Gen. 192 (1946). Similarly, travel for the benefit of such a corporation is not "official travel" and hence not compensable from appropriated funds, unless it can be shown that the travel also reasonably relates to some official duty of the traveler. B-56268, June 20, 1946.

Another area in which the relationship of Title 36 corporations to the federal government arises is the applicability of the Federal Tort Claims Act (FTCA), which expressly applies to "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Under this standard, the Red Cross is not an agency or instrumentality for FTCA purposes. Rayzor v. United States, 937 F. Supp. 115 (D.P.R. 1996), aff'd mem., 121 F.3d 695 (1st Cir. 1997). Nor is the Civil Air Patrol, another Title 36 corporation. Pearl v. United States, 230 F.2d 243 (10th Cir. 1956); Kiker v. Estep, 444 F. Supp. 563 (N.D. Ga. 1978).

It is no accident that the issue has been raised against these two corporations. Much of what they do seems like "government work." One of the purposes of the Red Cross is to furnish volunteer aid to sick and wounded members of the armed forces in time of war. 36 U.S.C. § 300102(1). A purpose of the Civil Air Patrol is to encourage citizen efforts "in maintaining air supremacy," 36 U.S.C § 40302(1)(a), a governmental purpose if there ever was one. Be that as it may, the corporation's "chameleon-like existence" or the argument that it amounts to a "part-time federal agency" is not enough to make the FTCA applicable. Estep, 444 F. Supp. at 565. The test is whether the government controls its day-to-day operations. Rayzor, 937 F. Supp. at 119, citing United States v. Orleans, 425 U.S. 807 (1976).

Still another area of controversy is the application of 28 U.S.C. § 1349, which prohibits courts from taking "federal question" jurisdiction of a suit by or against a corporation solely because "it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." The typical Title 36 corporation being a non-stock corporation, some courts have applied section 1349 by using a "government control" test. Thus, for example, the American Red Cross "functions independently and is in no way controlled by the Government" for purposes of 28 U.S.C. § 1349, one reason being that the president appoints only eight of its 50 governors. C.H. v. American Red Cross, 684 F. Supp. 1018, 1022 (E.D. Mo. 1987), followed in, e.g., Collins v. American Red Cross, 724 F. Supp. 353 (E.D. Pa. 1989). In Burton v. United States Olympic Committee, 574 F. Supp. 517, 524 (C.D. Cal. 1983), the court reached the same result for the United States Olympic Committee because (1) USOC was the legal owner of its property, (2) any surplus funds do not revert to the U.S. Treasury, (3) it is self-governing and operates independent of federal control, and (4) it is not included in the Government Corporation Control Act.

Other courts have applied the stock ownership requirement literally and held that section 1349 can never form the basis of federal jurisdiction of a non-stock corporation because the government cannot own half of what does not exist. E.g., Burton v. USOC, 574 F. Supp. at 523; Stop the Olympic Prison v. USOC, 489 F. Supp. 1112, 1117 (S.D.N.Y. 1980). The Supreme Court has noted the split, but has not resolved it. American National Red Cross v. S.G., 505 U.S. 247, 251 and n.3 (1992).

d. Federally Funded Research and Development Centers

A "Federally Funded Research and Development Center" (FFRDC) is a privately owned but government-funded entity which has a long-term contractual relationship with one or more federal agencies to perform research and development and related tasks.[85] One authority refers to them as "'captive corporations,' which are legally private, but are almost entirely government financed."[86] The Federal Acquisition Regulation (FAR) states:

> "FFRDC's are operated, managed, and/or administered by either a university or consortium of universities, other not-for-profit or nonprofit organization, or an industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization." FAR, 48 C.F.R. § 35.017(a)(3).

The funding agency, which is usually the agency which participated in establishing the FFRDC, is called the sponsor. 48 C.F.R.

[85] Apart from this overview treatment, our discussion does not further address these entities.

[86] Harold Seidman, Government Corporations in the United States, 22 Optimum 40, 43 (1991) (hereafter Seidman 1991).

§ 35.017(b). The FFRDC may be permitted to accept work from parties other than the sponsor if and to the extent specified in the sponsoring agreement. 48 C.F.R. § 35.017-1(c)(5). A sponsoring agreement may not exceed five years, but is renewable in five-year increments indefinitely. 48 C.F.R § 35.017-1(e). The FAR tells agencies to phase out FFRDCs which are no longer needed. 48 C.F.R § 35.017-5. Some better known FFRDCs sponsored by the Department of the Air Force are the Rand Corporation, Mitre Corporation, and the Massachusetts Institute of Technology's Lincoln Laboratory.

FFRDCs originated in the World War II era[87] and have proliferated in subsequent decades. The 1972 report of the Commission on Government Procurement, although expressing concern over the potential pitfalls of single-agency funding,[88] recommended that agencies continue to have "the option to organize and use FFRDCs to satisfy needs that cannot be satisfied effectively by other organizational resources."[89] The Office of Management and Budget's Office of Federal Procurement Policy implemented the Commission's recommendation by issuing Policy Letter No. 84-1, 49 Fed. Reg. 14462, 14464 (April 11, 1984), which was in turn implemented by the subsequent inclusion of coverage in the FAR.

There is no requirement that the creation of an FFRDC be specifically authorized by statute. 71 Comp. Gen. 155 (1992) (Government Corporation Control Act requirement for specific authority not applicable to FFRDCs); B-145898-O.M., June 30, 1961 (same). The authority to establish and sponsor FFRDCs is viewed as incident to the agency's authority to enter into contracts. 71 Comp. Gen. at 157. Although arguably unnecessary under this theory, in some cases, presumably because of the amounts involved, Congress has specifically authorized agencies to establish FFRDCs. For example, the 1991 appropriation for the Internal Revenue Service authorized the IRS to spend up to $15 million to establish an FFRDC as part of its tax systems modernization program. Pub. L. No. 101-509, 104 Stat. 1389, 1395 (1990). Legislation enacted in 1987

[87] 2 Report of the Commission on Government Procurement 17 (1972).

[88] Id. at 18.

[89] Id. at 64 (App. E., Recommendation No. 5).

authorized the Secretary of Defense to establish an FFRDC to provide support to the Strategic Defense Initiative program. Pub. L. No. 100-180, § 227, 101 Stat. 1019, 1057 (1987).

While there is no government-wide statutory guidance on the creation and use of FFRDCs, there is legislation applicable to the military departments. Before obligating or expending funds to operate an FFRDC, the sponsoring department must report to Congress on the "purpose, mission, and general scope of effort" of the proposed FFRDC, and must observe a 60-day waiting period. 10 U.S.C. § 2367(c)(1). An FFRDC may be used only for work that is within the center's purpose, mission, and general scope of effort, as set forth in the sponsoring agreement. 10 U.S.C. § 2367(a). Defense is to include in its budget submission "the proposed amount of the man-years of effort to be funded" for each FFRDC, and is to report the "actual man-years of effort expended" and the actual obligations for each FFRDC after the end of each fiscal year. 10 U.S.C. § 2367(d).

The FFRDC is not an arm's length contractor. By virtue of its access to government data, employees, and facilities, it is said to have a "special relationship" with the government. FAR, 48 C.F.R. § 35.017(a)(2). As one might suspect, the FFRDC concept is not free from controversy. Dr. Seidman states:

> "The first FFRDCs were able to provide a research environment, capable of attracting and retaining the best scientists, which it was difficult to reproduce within the government structure. It is now claimed that establishment of FFRDCs sometimes is motivated more by the desire to evade government personnel and procurement regulations than by desire to create a research environment. It is alleged that some are little more than job shops for their government sponsors. Industry is unhappy because of what it sees as unfair competition."[90]

The "job shop" allegation stems in part from the practice of granting "fringe benefits" which, although reimbursed directly from appropriated funds, exceed those of regular government employees, sometimes by a very wide margin. One example is discussed in a GAO report whose title is very revealing: University Research: U.S. Reimbursement of Tuition Costs for University Employee Family

[90]Seidman 1991, supra note 86, at 43-44. For further discussion of the competition aspects, see Competition: Issues on Establishing and Using Federally Funded Research and Development Centers, GAO/NSIAD-88-22 (March 1988).

Members, GAO/NSIAD-95-19 (February 1995). The Office of Management and Budget subsequently inserted language in OMB Circ. No. A-21, sec. J.8.f(2), to make tuition benefits allowable only for the employees themselves.

To help ameliorate industry's concerns, the FAR requires each sponsoring agreement to prohibit the FFRDC from competing with any non-FFRDC for government contracts. 48 C.F.R. § 35.017-1(c)(4). This is not limited to the FFRDC as prime contractor. In a bid protest decision, for example, GAO found the regulation violated where an agency accepted a proposal in which an FFRDC would "team" with the awardee to perform a substantial amount of the work. B-243650.2, November 18, 1991. GAO explained:

"[The FAR] does not make a distinction between an FFRDC's role as a prime contractor or subcontractor. We think that the determination whether an FFRDC is in fact competing with a private firm in violation of the regulation depends not upon whether the FFRDC has submitted a proposal in its own name but upon the impact of its participation, both from a technical and a cost standpoint, upon the procurement." Id. at 5.

Similarly, where the contracting agency discovered the relationship after it had awarded the contract, it properly terminated the contract for the convenience of the government. B-276240 et al., May 23, 1997.

Even though it may be funded entirely, or nearly so, from the federal treasury, an FFRDC is regarded as a contractor and not an agency or instrumentality of the United States. 71 Comp. Gen. 155, 158 (1992). For example, in deciding a 1981 dispute over reimbursement of costs, the Armed Services Board of Contract Appeals treated an FFRDC no differently than any other contractor, notwithstanding that it was "100 percent funded by the government." Massachusetts Institute of Technology, ASBCA No. 23079, 81-2 B.C.A. ¶ 15,451 (1981) (cited in 71 Comp. Gen. at 157 n.2). Similarly, GAO analyzed the Mitre Corporation as follows:

"While the MITRE Corporation was established . . . for the purpose of engaging in and procuring services to or for the United States Government or any department or agency thereof, the company may not be said to be in any respect an agency or instrumentality of the United States. The affairs of the company are in the hands of private persons, no element of control being vested in the United States, and no provision is made for distributing corporate assets to the United States upon dissolution of the company. Such interest as the United States might have in MITRE would arise solely under contracts entered into with the company in the same manner as under contracts with any other corporation." B-145898-O.M., June 30, 1961, at 5-6.

The relationship of FFRDCs to the government also comes into play in protests against the award of subcontracts by FFRDCs. GAO will review these in limited circumstances if the subcontract is "by or for" a government agency." 4 C.F.R. § 21.13(a). The protester invariably argues that the FFRDC's contracts are, by virtue of its status, "for the government." GAO will not draw a conclusion either way solely from the contractor's status as an FFRDC, but will examine the specific contractual relationship. The "by or for" standard contemplates situations in which the FFRDC is effectively acting as the government's agent or is largely a conduit between the government and the subcontractor. This could happen, for example, where the FFRDC is operating and/or managing a government facility (as opposed to simply using government-furnished facilities), or otherwise providing large-scale management services. 69 Comp. Gen. 334 (1990); B-244711, October 16, 1991.

A variation on this theme is the so-called "GOCO"—a government-owned, contractor-operated facility. See, for example, United States v. Anderson County, Tennessee, 705 F.2d 184 (6th Cir. 1983), describing a GOCO used by the Department of Energy. Energy also funds a group of GOCO research laboratories. A useful report on these is Department of Energy: Uncertain Progress in Implementing National Laboratory Reforms, GAO/RCED-98-197 (September 1998).

e. Summing Up

"Developments in the last 20 years might make one suspect that the U.S. government is going quasi."[91]

The categories we have described make up by far the major portion of the "government corporation universe." They are, however, by no means exclusive. Other agency-specific or program-specific examples dot the federal landscape. One is the Production Credit Association (PCA). PCAs are corporate financial institutions chartered by the Farm Credit Administration under statutory authority. They are statutorily designated as instrumentalities of the

[91]Seidman 1988, supra note 71, at 23.

United States. As such, they have been held immune from awards of punitive damages. Smith v. Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985); Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109 (8th Cir. 1985); In re Sparkman, 703 F.2d 1097 (9th Cir. 1983). However, they are not "primarily acting as instrumentalities of the United States" for purposes of the Federal Tort Claims Act. South Cen. Iowa Prod. Credit Ass'n v. Scanlan, 380 N.W.2d 699 (Iowa 1986); Waldschmidt v. Iowa Lakes Prod. Credit Ass'n, 380 N.W.2d 704 (Iowa 1986). Also, they are sufficiently independent of the federal government so as not to share the government's exemption from 28 U.S.C. § 1341, which bars federal jurisdiction of state tax cases in favor of remedies under the state courts. Arkansas v. Farm Credit Serv., 520 U.S. 821 (1997). One court analogized them to national banks in the Federal Reserve System. United States v. Haynes, 620 F. Supp. 474, 477 (M.D. Tenn. 1985) (holding that they were not independent agencies for purposes of 18 U.S.C. § 208, the criminal conflict of interest statute).[92]

Another example is the entity addressed in Varicon Int'l v. OPM, 934 F. Supp. 440 (D.D.C. 1996), a corporation formed by former OPM employees, with OPM's encouragement. OPM awarded it a sole-source contract to conduct background investigations previously conducted by the agency itself. The court viewed this as nothing more than "a private corporation which was awarded a government contract" (Id. at 447), and thus not subject to the Government Corporation Control Act's requirement for statutory authority. See also 53 Comp. Gen. 86 (1973).

Some analysts believe that an increasing portion of the government's business is being done outside the traditional structure. They also suggest that "[t]he line between what is 'public' and what is 'private' has become indistinct."[93] The literature uses terms like "quasi-private," "quasi-government," and "hybrid organizations."[94] Leazes

[92]For cases reaching similar results with respect to other corporations under an earlier version of the statute, see United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926), and 16 Comp. Gen. 613 (1936).

[93]Moe and Stanton, supra note 69, at 321; Musolf and Seidman, supra note 72. Adding those purely private entities whose doors would close in a matter of weeks if the federal money stopped flowing further emphasizes the point.

[94]See Musolf and Seidman, supra note 72, at 124.

calls them "twilight-zone corporations."[95] Moe regards them as "relatively unaccountable units at the margin of government."[96] Seidman consigns them to a "terra incognita, somewhere between the public and private sectors."[97] The National Academy of Public Administration (itself a Title 36 corporation) has reported:

> "The boundary between the public and private sectors has been blurred so that one cannot say with assurance to which sector many corporations belong or to whom they are accountable."[98]

Students of public administration disagree over whether this blurring is good or bad.[99] Whether it is good, bad, or somewhere in between, it is here, likely to remain, and must be included in any consideration of federal spending issues.

3. Creation

To create a private business corporation, the incorporators file articles of incorporation with a designated office in the jurisdiction—state or District of Columbia—in which they wish to incorporate. Each state, as well as the District of Columbia, has an incorporation law that details these procedures and addresses other aspects of the corporation's existence, such as corporate powers, liability of officers, and issuance of stock. For example, the D.C. law is the District of Columbia Business Corporation Act, 29 D.C. Code Ch. 3.

There is no such thing as a federal incorporation statute. Rather, Congress ordinarily charters a government corporation by specific legislation that sets out its purposes, powers, structure, obligations

[95]Leazes, supra note 44, at 36.

[96]Moe 1983, supra note 48, at 3.

[97]Seidman 1988, supra note 71, at 25.

[98]NAPA 1981, supra note 51, at 4. If this passage is evocative of Moe and Seidman, it may be because both were members of the panel which conducted the NAPA study. Id. at App. 1.

[99]See, e.g., Seidman 1988, supra note 71, at 23-24. For an examination of the hybrid nature of Amtrak, see Arnold Adams, The National Railroad Passenger Corporation [Amtrak]—A Modern Hybrid Corporation Neither Private Nor Public, 31 Bus. Law. 601 (1976).

and sources of funding. Congress may also charter a government corporation by delegating the power to the executive branch or to another government corporation. Either way, the creation of a government corporation must be explicit; it cannot be implied.

a. Historical Background and Purpose

While the proliferation of government corporations largely occurred during the 20th century, the federal government has created or used government corporations since the beginning of the republic. The earliest examples were banking institutions. The first, predating even the adoption of the Constitution, occurred when the Continental Congress authorized the Bank of North America in 1781 and the Superintendent of Finance purchased approximately five-eighths of the capital stock in the name of the government, making the United States the majority owner.[100] In 1791, Congress created and incorporated the (First) Bank of the United States, authorizing the United States to subscribe 20 percent of the corporation's stock. Act of February 25, 1791, ch. 10, 1 Stat. 191.[101] Initial governmental participation in this and other banking enterprises consisted of investment in stock as opposed to management of the corporation.

The Second Bank of the United States was incorporated by the Act of April 10, 1816, ch. 44, 3 Stat. 266, in which the United States would subscribe 20 percent of the Bank's capital stock and the President would appoint, by and with the consent of the Senate, 5 of the Bank's 25 directors, the rest to be elected annually by shareholders other than the United States. The legality of the Second Bank was challenged, resulting in the landmark case of M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In that decision, the Supreme Court upheld the constitutionality of the Second Bank of the United States and the government's authority to create or involve itself in commercial enterprises. The Court held that although the Constitution did not specify creating corporations as one of the government's enumerated powers, the Necessary and Proper Clause of the Constitution (Art. I, § 8, cl. 18) allowed Congress to charter and use a corporation for the public purpose of banking. Chief Justice Marshall stated:

[100] McDiarmid, supra note 45, at 21.

[101] A capsule history starting with the 1791 act may be found in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 386-391 (1995).

"The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Id. at 411.

Later in the opinion, the Chief Justice wrote what has become one of the most famous statements in American constitutional law:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but [are consistent] with the letter and spirit of the constitution, are constitutional." Id. at 419.

The courts have never seriously questioned Congress' power to create or employ corporate entities as a means of carrying into effect the substantive powers granted to it by the Constitution. For example, in Luxton v. North River Bridge Co., 153 U.S. 525 (1894), the Supreme Court held that Congress, in exercising its power to regulate interstate commerce, indisputably has the power to create a corporation to construct a bridge across navigable water between two states.[102] Congress is not restricted to creating a new corporation, but can acquire or employ an existing private corporation to carry out its substantive constitutional powers. New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937). Here, Congress acquired the entire capital stock of a private corporation and elected its board of directors to carry out constitutional powers of regulating commerce and providing for national defense in maintaining, operating and protecting the Panama Canal.

Congress has created or employed corporations to carry out varied purposes. Turning again to Chief Justice Marshall's words, "[t]he power of creating a corporation is never used for its own sake, but for the purpose of effecting something else." M'Culloch, 17 U.S. at 411. A more recent analyst has noted that "[g]overnment-

[102] Other cases upholding the constitutionality of various government corporations include Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (Federal Land Banks); Doherty v. United States, 94 F.2d 495 (8th Cir. 1938) (Federal Deposit Insurance Corporation); Weir v. United States, 92 F.2d 634 (7th Cir. 1937) (same); Langer v. United States, 76 F.2d 817 (8th Cir. 1935) (Reconstruction Finance Corporation).

sponsored corporations are simply a means of securing governmental objectives."[103] Some government corporations are charged with developing projects or functions not adaptable to private industry while others are responsible for meeting needs in the market that are unmet by private industry. Those purposes include governance, as well as social and educational programs. Government corporations have also been created, usually in bunches, to meet war or economic emergencies. The 20th century saw three such surges: World War I, the Great Depression, and World War II.

First, during World War I, government corporations were created to mobilize the war effort by transacting business in the same manner as private commercial firms. These included the War Finance Corporation,[104] the United States Shipping Board Emergency Fleet Corporation,[105] the United States Spruce Production Corporation,[106] and others. After the war, many of the corporations, having fulfilled their mission to support the war effort, and being intended as temporary to begin with, were liquidated.

It was not long after World War I before another crisis erupted leading to the next surge in creating government corporations. The role of the federal government changed dramatically in response to the Great Depression, even more than it changed as a result of World Wars I and II. During the Depression, the federal government used

[103]Ronald J. Krotoszynski, Jr., Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 Mich. L. Rev. 302, 312 (1995).

[104]The War Finance Corporation was organized under the Act of April 5, 1918, ch. 45, 40 Stat. 506, to provide financial assistance to industries important to the successful prosecution of the war.

[105]The Emergency Fleet Corporation was organized on April 16, 1917 (McDiarmid, supra note 45, at 24-25) to purchase, construct and operate merchant vessels under the authority of the original Shipping Board Act, Act of September 7, 1916, ch. 451, § 11, 39 Stat. 728, 731.

[106]The Act of July 9, 1918, ch. 143, 40 Stat. 845, 888, authorized the War Department's Director of Aircraft Production to form corporations to aid the government's production of aircraft and related equipment. Under this authority, the United States Spruce Production Corporation was created on August 20, 1918, to make available aircraft lumber for war use. Due to the signing of the armistice, it was in full operation for a total of eleven days. McDiarmid, supra note 45, at 29-30.

government corporations extensively to stabilize the economy and encourage economic growth.[107] For example, the Reconstruction Finance Corporation had a central role in planning and financing recovery programs by providing loans to banks, railroads, business enterprises, mining interests, public agencies, agricultural marketing organizations, and purchasing stock in banks, insurance companies, mortgage corporations, and corporations engaged in defense activities.[108] The Federal Deposit Insurance Corporation was created to promote and preserve public confidence in banks and protect the money supply by insuring deposits, periodically examining insured banks, and regulating certain securities, mergers, consolidations, acquisitions and assumption transactions of the banking sector.[109] The Commodity Credit Corporation was created for the purpose of "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of facilitating the orderly distribution of agricultural commodities."[110] The primary method the CCC uses to achieve its purpose is providing loans. The Federal Housing Administration was established to encourage improvement in housing standards and conditions, to provide an adequate home financing system by insurance of housing mortgages and credit, and to exert a stabilizing influence on the mortgage market.[111] The primary method used by FHA to fulfill its purpose is providing mortgage insurance.

World War II provided the impetus for the third major surge in 20th century government corporations. Over twenty government corporations were created to meet the wartime production needs of

[107]Leazes, supra note 44, at 21.

[108]Act of January 22, 1932, ch. 8, 47 Stat. 5, as amended. See also Act of June 25, 1940, ch. 427, § 6, 54 Stat. 572, 574, and Presidential Proclamation No. 2016, December 8, 1932.

[109]Banking Act of 1933, § 8, 48 Stat. 162, 168, superseded by Federal Deposit Insurance Act, 64 Stat. 873 (1950), codified in 12 U.S.C. ch. 16.

[110]15 U.S.C. § 714. The Commodity Credit Corporation was originally established by Exec. Order No. 6,340, October 16, 1933, and was given a statutory charter in 1948.

[111]National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246 (1934). Provisions now appear in 12 U.S.C. ch. 13, subch. II, and 42 U.S.C. 3533.

World War II. These included the War Damage Corporation[112] (to provide insurance and reasonable protection against loss or damage to property, real or personal, resulting from enemy attack, including any action taken by the military, naval or air forces of the United States in resisting enemy attack), the Smaller War Plants Corporation[113] (to aid in mobilizing the productive facilities of small business in the interest of successful prosecution of the war), and the Defense Plant Corporation[114] (to aid the Government in its national defense by financing or engaging in the construction, extension and operation of plants engaged in war production).

Of course, the end of World War II did not end the practice of creating and using government corporations. Since then, government corporations have continued to be created to address myriad economic, social, and other issues affecting the nation. For example, Congress created the Government National Mortgage Association (Ginnie Mae) in 1968 to provide the means of transferring funds from the nation's securities markets into the residential housing mortgage market. 12 U.S.C. §§ 1716b, 1717. The Pension Benefit Guaranty Corporation was created in 1974 to administer the pension plan termination insurance program created under the Employee Retirement Income Security Act of 1974 (ERISA) by encouraging the continuation and maintenance of voluntary private pension plans, providing uninterrupted payment of pension benefits to beneficiaries under plans covered by ERISA and maintaining premiums at the lowest level consistent with carrying out its obligations under ERISA. 29 U.S.C. § 1302. The Resolution Trust Corporation was established in 1989 in response to the savings and loan crisis, to manage and resolve all cases involving failed depository institutions insured by the Federal Savings and Loan Insurance Corporation before the enactment of the Financial

[112]The War Damage Corporation was actually created by the Reconstruction Finance Corporation under statutory authority. See 15 U.S.C. § 606b (1946).

[113]The Smaller War Plants Corporation was created by Pub. L. No. 77-603, § 4, 56 Stat. 351, 353 (1942).

[114]The Defense Plant Corporation was created by the Reconstruction Finance Corporation on August 22, 1940, under the same statutory authority as the War Damage Corporation (discussed in note 111, supra). See GAO, Reference Manual of Government Corporations, S. Doc. No. 79-86, at 32 (1945).

Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989. 12 U.S.C. § 1441a.

At any given time, it seems, several new corporations are being proposed or studied. See, e.g., Government Corporations: Profiles of Recent Proposals, GAO/GGD-95-57FS (March 1995). The Office of Management and Budget disseminated a document in 1995 entitled "Specifications for Creating Government Corporations" (OMB Memorandum M-96-05, December 8, 1995). This presents OMB's standards and approach for evaluating proposals for new corporations. The OMB paper incorporates many of the principles of the 1981 NAPA report noted earlier.

Congress has categorized or designated some government corporations as nonprofit (e.g., Legal Services Corporation 42 U.S.C. § 2996b(a)) while others are designated as for-profit. For example, the United States Enrichment Corporation (USEC) was created to operate as a business enterprise on a profitable and efficient basis by marketing and selling enriched uranium, and uranium enrichment and related services, primarily for use by electric utilities worldwide. 42 U.S.C. § 2297b.[115] Another example is Amtrak, whose organic legislation currently specifies that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). Originally, Amtrak's statute simply declared it to be a "for profit corporation" (Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330), but the language was changed to recognize the realities of the situation.

b. Need for Statutory Authority

Prior to 1946, government corporations came into being in one of three ways: (1) specifically created by statute, (2) created by an executive branch department or another government corporation under statutory authorization or delegation, or (3) created by the executive branch by purely administrative action, with no statutory

[115]Congress enacted legislation in 1996 to "privatize" USEC. See USEC Privatization Act, enacted as part of the massive Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. III, Ch. 1, Subch. A, 110 Stat. 1321, 1321-335 (1996).

This "omnibus" act is, itself, a fascinating document. Its publication in Statutes at Large begins with a footnote stating that the act's "original hand enrollment as signed by the President . . . is reprinted without corrections. Footnotes indicate missing or illegible text in the original."

authority. Lebron v. National R.R Pass'r Corp., 513 U.S. 374, 388-389 (1995). The power of Congress to create government corporations, either directly or by delegation, had been settled since M'Culloch v. Maryland[116] in 1819. The issue of executive creation came to a head in the 1940s. The lines of battle were formed when the Farm Security Administration, which wanted to purchase land but lacked the requisite statutory authority, created several corporations whose officers and directors were Department of Agriculture employees. The Department then made loans to the corporations, which in turn bought the land. Not surprisingly, the legality of this arrangement was questioned. On the issue of whether the Department could create corporations without statutory authority, the parties split along predictable lines. The Comptroller General of the time, who never much liked government corporations to begin with, said "No." B-23881, March 5, 1942. See also 21 Comp. Gen. 892, 893 (1942). The Attorney General of the time, who apparently liked them a lot more, said "Yes." 40 Op. Att'y Gen. 193 (1942). See also 37 Op. Att'y Gen. 288 (1933).

GAO's conclusion was based partially on sovereign immunity reasoning. The power to sue and be sued is an important power of any corporation. The Supreme Court had recently decided Federal Housing Administration v. Burr, 309 U.S. 242 (1940), and Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939), which strongly implied that this power could be granted only by Congress. B-23881, March 5, 1942, at 18. It was not necessary for the Court to directly address the question because neither case dealt with a corporation created purely by executive action, but it would seem fundamental that an agency cannot confer powers, authorities, or exemptions it does not have, unless of course it is operating under express statutory authority.[117]

Of course, as the "sue and be sued" point suggests, the heart of the question was never the creation of corporate entities per se. It was the powers that could be given to them. One decision stated:

[116] 17 U.S. (4 Wheat.) 316 (1819). See the discussion above in 17(B)(3)(a).

[117] The Attorney General's opinion did not address this point, but did remind GAO that it had at least implicitly condoned the practice by issuing decisions concerning nonstatutory corporations—16 Comp. Gen. 613 (1936), for example—without questioning the legality of their creation. 40 Op. Att'y Gen. at 201.

"The Virgin Islands Company created without specific Congressional authorization and . . . therefore, the corporate character of the company did not serve to free its funds from the provisions of law to which they would have been subject if administered by an unincorporated Government agency." 21 Comp. Gen. 928, 930 (1942).

After its creation, however, Congress had given the corporation statutory recognition. In light of this, GAO concluded that the corporation could, if reasonably necessary to corporate business, go beyond certain use limitations imposed as a matter of policy on funds available to other agencies, and advised that the corporation could use its funds to buy insurance on its property. Id. at 931. A 1934 decision contained a stronger statement:

"There is a clear and vital difference between a corporation created pursuant to statutory direction with clear statutory grant to remove its transactions from the safeguards surrounding appropriations and to avoid not only Executive direction but accountability for the public moneys entrusted to it, and a corporation created within the Government [without such specific authority]. In some instances, it is true, the laws creating corporations have been so broad as to exclude Executive control and permit escape from accountability. A corporation of the other class, however, created as an additional administrative agency, can have no such status or uncontrolled authority. It can exercise no wider authority than as though operating as an unincorporated unit in the Executive branch. By the act of incorporating Executive responsibility is not shifted, Executive control avoided, nor accountability escaped." A-53085, January 11, 1934, at 5.

The idea of a legislative requirement was not new. Interestingly, opposition to government corporations in the 1930s stemmed not so much from the accountability perspective as from the fact that they competed with the private sector. See, e.g., 79 Cong. Rec. 4048 (1935). As a congressional report put it, "[g]overnment corporations to a great degree do business in competition with private enterprise. They encroach upon and compete with business, which is under serious disadvantage [while the government corporation's advantages, like tax exemptions and cheap credit, make it] an invincible competitor."[118]

The idea of a legislative charter became law several years later as section 304(a) of the Government Corporation Control Act, Pub. L.

[118]Joint Committee on Reduction of Nonessential Federal Expenditures, Reduction of Nonessential Federal Expenditures—Government Corporations, S. Doc. No. 78-227, at 25 (1944).

No. 79-248, 59 Stat. 597, 602 (1945). Now codified at 31 U.S.C. § 9102, it provides:

> "An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."

The legislative history of the Corporation Control Act noted the existence of several government corporations created without legislative authority and the potential for problems arising when such corporations were created under state law.[119] The House Report accompanying the legislation stated:

> "The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress or under State charters to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action." H.R. Rep. No. 79-856, at 11 (1945).

Section 9102, by its terms, applies to acquisition as well as creation. With respect to existing nonstatutory corporations, the statute directed them to either seek a legislative charter or liquidate. Pub. L. No. 79-248, § 304(b), 59 Stat. at 602.

There has been little case law, administrative or judicial, addressing the requirement of section 9102. A number of cases have found section 9102 inapplicable. We have previously noted two of these: 71 Comp. Gen. 155 (1992) (federally funded research and development centers) and Varicon International v. OPM, 934 F. Supp. 440 (D.D.C. 1996) (corporation formed by former government employees to do the same work they did when they were on the payroll). A 1975 GAO opinion to a committee chairman also found the statute inapplicable to so-called "proprietaries" of the Central Intelligence Agency—corporations formed by the CIA largely to provide "cover" for CIA activities. GAO found "irreconcilable conflict" between section 9102 and the statutory mandate of the CIA. This being the case, the answer was easy—the CIA's mandate

[119] S. Rep. No. 79-694, at 13 (1945). See also S. Doc. No. 78-227, supra note 118, at 27. (Strictly speaking, this is not direct legislative history of the Control Act.)

had to prevail. B-179296, December 10, 1975. A later opinion found the statute inapplicable to the creation of subsidiaries by a federally-chartered private institution which had been converted from a mixed-ownership government corporation. B-219801, October 10, 1986, at 5-6. Prior to the statutory conversion, section 9102 would have applied. Id.

A 1970 GAO case dealt with grants by the old Office of Economic Opportunity to a nonprofit corporation established for the purpose of carrying out OEO programs by hopefully generating closer private-sector involvement. The question was whether the nonprofit was a legitimate grantee or merely an agent of the OEO. GAO's review showed that the nonprofit was wholly independent of the OEO and was not a disguised government corporation. Therefore, there was no violation of 31 U.S.C. § 9102. B-130515, August 11, 1970. The analysis was very similar to that employed in B-145898-O.M., June 30, 1961, noted earlier with respect to the MITRE Corporation.

An example of what GAO regarded as a clear violation of the statute is found in B-278820, February 10, 1998. The question was whether the Federal Communications Commission was authorized to establish two not-for-profit corporations to administer certain functions of the universal service program for schools, libraries, and rural health care providers.[120] The FCC argued that it did not establish or acquire the corporations, but had directed the National Exchange Carrier Association, Inc. to create them. While it was true that the Association and not the FCC was the incorporator, an examination of the FCC's role showed that it was involved in approving the proposed articles of incorporation and bylaws, approving the chief executive officers of the corporations, determining the size, composition, and term of office of the boards of directors, as well as selecting or approving the directors themselves. In GAO's view, the corporations were created to carry out governmental functions (specifically, the implementation of a statutory mandate), and the Association had simply acted as the incorporator for the convenience of the FCC. Under these circumstances, although the FCC did not directly establish or acquire the corporations, the identity of the incorporator was not

[120]The statutory mandate for this program is section 254(h) of the Communications Act of 1934, as added by the Telecommunications Act of 1996, 47 U.S.C. § 254(h).

the determinant of section 9102's applicability. The prohibition would be meaningless if agencies could avoid it simply by using another party to act as incorporator. Thus, for purposes of 31 U.S.C. § 9102, an agency may not cause, directly or indirectly, a corporation to be created to carry out government functions without specific statutory authority.

Once GAO determined that the FCC had "established" a corporation within the meaning of section 9102, the next issue was whether the FCC had the requisite statutory authority. The FCC suggested that it was authorized to establish the corporations pursuant to sections 254 and 4(i) of the Communications Act. Section 254, 47 U.S.C. § 254, involves the FCC in a variety of universal service program functions, such as defining universal service, developing specific and predictable support mechanisms, and providing for equitable contributions by service providers, but nowhere authorizes the creation of corporations. Section 4(i), 47 U.S.C. § 154(i), provides:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter [the Communications Act], as may be necessary in the execution of its functions."

GAO held that this admittedly broad but nevertheless general authority is not sufficient to satisfy the specific requirement of section 9102. GAO concluded that the FCC exceeded its authority and violated section 9102 when it directed the creation of the corporations in question. In reaching this conclusion, GAO noted a line of judicial decisions treating section 4(i), part of the FCC's 1934 organic legislation, as the agency's "necessary and proper" clause. None of them, however, stand for the proposition that the FCC may invoke section 4(i) to disregard specific requirements of later-enacted statutes. Citing Lebron v. National R.R. Pass'r Corp., 513 U.S. 374, 396 (1995), GAO noted that the Supreme Court had described section 9102 as "evidently intended to restrict the creation of all Government-controlled policy-implementing corporations, and not just some of them." B-278820, at 7. The FCC not unexpectedly disagreed. The two corporations in question were subsequently merged into a larger entity.

Another skirmish involved creation of the now-defunct Federal Asset Disposition Association (FADA). In a series of assignments relating to the Federal Home Loan Bank Board, GAO reviewed the Board's authority for the creation of various entities operating under its direction. One of those entities was FADA, created pursuant to statutory authority to organize new federal savings and loan associations. Problem was, GAO felt that an entity created under that authority should bear some resemblance to a federal savings and loan association. FADA, on the contrary, exercised none of the basic functions of a savings and loan association. Most tellingly, it did not accept savings and it did not make loans. B-226708.4, March 15, 1989 (Enclosure at 4). In fact, GAO found that the Federal Savings and Loan Insurance Corporation (FSLIC) held all of FADA's stock, the Bank Board appointed its board of directors, and FADA's self-described sole purpose was to assist the FSLIC in managing and disposing of assets. It was hard to escape the conclusion that the FADA was a federal savings and loan association "only on paper." Id. at 3-4. Accordingly, GAO concluded that FADA was in fact a corporation wholly owned and controlled by the federal government and engaged in the performance of federal functions, and that its creation exceeded the Bank Board's authority.[121] In addition to B-226708.4 cited above, see B-226708.3, December 12, 1988, B-226708.2, September 29, 1988, B-226708, September 6, 1988, and Failed Thrifts: No Compelling Evidence of a Need for the Federal Asset Disposition Association, GAO/GGD-89-26 (December 1988).

A corporation created without legislative authority can be, in effect, "ratified" by subsequent legislation. For example, in 21 Comp. Gen. 928 (1942), the Virgin Islands case discussed earlier, although the corporation had been created without statutory authority, subsequent legislation made it clear that "Congress has recognized . . . the corporate existence and status." Id. at 930. See 17 Comp. Gen. 50 (1937) for another example. Subsequent legislation was also involved in the FADA situation, but GAO did not regard it as rising to the level of congressional ratification. B-226708, September 6, 1988, at 12.

[121]FADA was dissolved under the provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). Pub. L. No. 101-73, 103 Stat. 183. FIRREA also abolished both the Federal Home Loan Bank Board and the FSLIC. Id. § 401, 103 Stat. 354. Thus, all of the principal entities discussed in the GAO materials cited in the text are gone. The case remains useful, however, to illustrate the proposition that a goose does not become a swan merely because someone calls it one. For more on the FADA saga, see Moe 1995, supra note 41, at 22-26; Seidman 1988, supra note 71, at 26.

As noted previously, Congress may create a corporation directly, or it may authorize another agency or government corporation to do the creating. This is the reason for the "by or under" language in 31 U.S.C. § 9102. Of course this was true even prior to the Corporation Control Act. For example, the Reconstruction Finance Corporation, described briefly earlier, was so authorized and did in fact create several other government corporations.[122] For a more recent example, the Farm Credit System banks, which include the federal land banks, federal intermediate credit banks, and banks for cooperatives, are mixed-ownership government corporations listed in 31 U.S.C. § 9101(2) and are therefore governed by the restriction contained in 31 U.S.C. § 9102. Thus, when it became desirable for Farm Credit System banks to be able to organize subsidiary corporations to perform certain functions the banks were authorized to perform, Congress recognized that specific statutory authority was required.[123]

Where Congress authorizes or delegates the creation of a corporation to some existing agency, the statute necessarily implies the authority for the creating agency to use its funds for the expenses of incorporation. 21 Comp. Gen. 892 (1942). This can include subscription to initial capital stock where required. 37 Op. Att'y Gen. 437 (1934). Logically enough, incorporation expenses of a corporation whose creation is not statutorily authorized are improper. A-90344, September 30, 1938; A-71172, February 26, 1936.

[122]Reconstruction Finance Corporation Act, § 5d, 47 Stat. 5 (1932), as amended, Act of June 25, 1940, 54 Stat. 572, 573. The RFC seized the opportunity "with gusto." Lebron, 513 U.S. at 389. Some of the government corporations the RFC created are the Defense Plant Corporation, Defense Supplies Corporation, Rubber Reserve Company, Metals Reserve Company, War Damage Corporation, United States Commercial Company, Petroleum Reserves Corporation, and the Rubber Development Corporation. See S. Doc. No. 78-227, supra note 118, at 10-14.

[123]12 U.S.C. §§ 2211 and 2212; H.R. Rep. No. 96-1287, at 23, 42 (1980), reprinted in 1980 U.S.C.C.A.N. 7095, at 7106, 7125 (accompanying report of House Agriculture Committee).

4. Management

a. Government Corporation Control Act

(1) Origin

Many of the government corporations created to meet production needs during World War I were liquidated promptly after the war. As a result, before the 1930s, "there was not a pressing need for general procedures to govern the management of government corporations." Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 3 (April 6, 1983); B-103455, May 21, 1951. During the Depression and New Deal eras, many corporations were formed to serve various economic needs, and others were created to meet the production needs of World War II. These were not so quick to go away. By the mid-1940s,"there were 63 wholly owned and 38 partly owned Federal corporations." Id. Government corporations "had gotten out of hand, in both their number and their lack of accountability." Lebron, 513 U.S. at 389. Control procedures, such as they were, were developed through piecemeal administrative action that was not necessarily consistent and did not include all government corporations.

The initial congressional response was a two-year study by the Joint Committee on Reduction of Nonessential Federal Expenditures. Noting the lack of overall control, the resulting report recommended the prompt enactment of legislation to (1) require government corporations to prepare business-type budgets for inclusion in the President's budget submitted to Congress; (2) provide for a measure of Treasury control over a corporation's accounts; and (3) require GAO audits.[124] This became the blueprint for what was to become the Government Corporation Control Act.

The first legislative step to implement these recommendations was the so-called George Act, Act of February 24, 1945, ch. 4, § 5, 59 Stat. 5, 6. This statute required GAO to audit the financial transactions of all government corporations annually, in accordance with the principles and procedures applicable to commercial corporate transactions and under rules prescribed by GAO. The law further required that each audit report "shall also show specifically every

[124] S. Doc. No. 78-227, supra note 118, at 30.

program, expenditure, or other financial transaction or undertaking, which, in the opinion of the Comptroller General, has been carried on or made without authority of law." Id. § 5(b). Because the statute used the words "all Government corporations," it applied to mixed-ownership, as well as wholly owned, corporations. 25 Comp. Gen. 7 (1945). Under section 5(c) of the George Act, the cost of the audits was to be borne by GAO's own appropriations, but a given corporation could agree to pick up the audit tab. (Why it might want to do so is not clear.)

The audit requirements of the George Act were superseded on December 6, 1945, when Congress enacted the Government Corporation Control Act (GCCA), Act of December 6, 1945, ch. 557, 59 Stat. 597, codified at 31 U.S.C. §§ 9101-9110. The new law was designed to provide an overall control of government corporations by making them more accountable to Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities.[125] The declared congressional policy was "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof."[126] The Control Act addresses budget controls, financial controls, and audit controls.

(2) Definitions

As noted earlier, the Government Corporation Control Act made no attempt to define the term "government corporation." Instead, it merely declared that there were two types: the wholly owned government corporation and the mixed-ownership government corporation. See 31 U.S.C. § 9101(1). The law lists the entities covered under each type. Wholly owned government corporations include the Commodity Credit Corporation, Export-Import Bank, Federal Prison Industries, Government National Mortgage Association, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Saint Lawrence Seaway Development Corporation, and the Tennessee Valley Authority, plus

[125]H.R. Rep. No. 79-856, at 3 (1945). An unimpressed Dr. Seidman has called the law the "government corporation de-control act." Seidman 1991, supra note 86, at 41; Moe 1995, supra note 41, at 7.

[126]GCCA, § 2, 59 Stat. 597.

several others. 31 U.S.C. § 9101(3). Examples of mixed-ownership government corporations are the Federal Deposit Insurance Corporation, Federal Home Loan Banks, Federal Land Banks, Central Liquidity Facility of the National Credit Union Administration, Resolution Funding Corporation, and the former Resolution Trust Corporation. 31 U.S.C. § 9101(2).

In trying to understand the two types, the plain meaning of the law's language is the proper starting point, although in this instance it doesn't help very much. The House report accompanying the original Control Act stated:

> "The bill distinguishes between wholly owned Government corporations, in which the Government holds all the stock or other capital interests, and mixed-ownership Government corporations, in which the Government has only a partial interest." H.R. Rep. No. 79-856, at 5 (1945).

The 1981 report of the National Academy of Public Administration followed suit. Wholly owned corporations—

> "pursue a governmental mission assigned in their enabling statute and are financed by appropriations. Their assets are owned by the government and managed by board members or an administrator appointed by the President or Secretary of a Department."

Mixed-ownership corporations—

> "have a combination of governmental and private equity; hence their assets are owned and managed by board members selected by both the President and private stockholders. They are usually intended for transition to the private sector."[127]

Thus, one might conceptualize the two types as corporations owned in their entirety by the federal government and corporations with some nonfederal ownership or joint financial participation. This, however, is not always the case. For example, the now-defunct United States Railway Association was designated as a mixed-ownership government corporation when in fact it operated solely

[127] NAPA 1981, supra note 51, at 21. An example of such a transition is discussed in B-219801, October 10, 1986.

and exclusively under direct annual appropriations from Congress, the same as any non-corporate agency.[128]

The only safe generalization is that a wholly owned government corporation is one listed in 31 U.S.C. § 9101(3) or so designated in its enabling legislation; a mixed-ownership government corporation is one listed in 31 U.S.C. § 9101(2) or so designated in its enabling legislation.[129] Of course, Congress remains free to create corporations wholly outside the Control Act structure. Examples are the Legal Services Corporation and the Corporation for Public Broadcasting. Accordingly, the wholly owned/mixed-ownership classification is relevant only for purposes of applying the rest of the Control Act.

The express language of the Control Act underscores this point. The lead to 31 U.S.C. § 9101 is "[i]n this chapter." (The original language, 59 Stat. at 597, was "[a]s used in this Act"). Applying this limitation, GAO concluded in 38 Comp. Gen. 565 (1959), that the Federal National Mortgage Association (Fannie Mae) was a wholly owned corporation for some purposes and a mixed-ownership corporation for others, all at the same time. Fannie Mae had originally been chartered as a wholly owned corporation. It was rechartered in 1954 as a mixed-ownership corporation, but kept its place on the Control Act's list of wholly owned corporations, apparently out of a desire to remain subject to the wholly owned provisions of the Control Act. (It subsequently became a government-sponsored enterprise.) The question in 38 Comp. Gen. 565 was whether Fannie Mae was authorized to lease space independent of the General Services Administration. Wholly owned corporations have to utilize GSA, mixed-ownership corporations do not. GAO concluded that the proper approach was to look at what the corporation was in reality—mixed-ownership—especially since the Control Act designations do not purport to apply to other laws.

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[128] Is the Administrative Flexibility Originally Provided to the U.S. Railway Association Still Needed?, GAO/CED-78-19, at 2 (February 22, 1978). The U.S. Railway Association was created by Pub. L. No. 93-236, title II, 87 Stat. 985, 988 (1974). The mixed-ownership designation was section 202(g), 87 Stat. 992. A typical appropriation was Pub. L. No. 94-134, 89 Stat. 695, 709 (1975). It was abolished in 1987. See 45 U.S.C. § 1341(a).

[129] See Budget Glossary Exposure Draft, supra note 67, at 57, 86.

The Government Corporation Control Act did not attempt to address corporations created after its enactment—nor could it, since one Congress cannot bind a subsequent Congress. There is evidence in the legislative history, however, of the contemplation that the act would be made applicable. In this connection, the report of the Senate Committee on Banking and Currency stated:

"The committee contemplates that any new corporation so created or authorized hereafter will be made subject to the appropriate provisions of this bill by the creating or authorizing legislation." S. Rep. No. 79-694, at 14 (1945).

This contemplation has met with limited success. Of the 30 corporations created by Congress from the mid-1960s to the mid-1980s, seventeen were not made subject to the Government Corporation Control Act. GAO/PAD-83-3, at 5; Harold Seidman and Robert Gilmour, Politics, Position, and Power at 285 (Oxford Univ. Press, 4th ed. 1986).

(3) Budget provisions

A key feature of the Government Corporation Control Act is the imposition of budgetary controls on wholly owned government corporations. Under 31 U.S.C. § 9103, each wholly owned government corporation must submit a "business-type budget" to the President each year. Neither the statute nor its accompanying committee reports attempt to define "business-type budget," but the law sets forth minimum requirements. These, set forth in 31 U.S.C. § 9103(b), include the following:

- Estimates of the financial condition and operations of the corporation for the current and following fiscal years and the condition and results of operations in the last fiscal year.
- Statements of financial condition, income and expense, and sources and use of money as well as information regarding its financial condition and operation.
- Estimates of administrative expenses (similarly not defined), borrowing, the amount of United States Government capital that will be returned to the Treasury during the fiscal year, and the appropriations needed to restore capital impairments.
- Provision for emergencies and contingencies.

Apart from these minimum requirements, the President, acting through the Office of Management and Budget, has broad discretion to determine the form and content of the corporate budgets. 31 U.S.C. § 9103(a).[130] The President may revise a corporation's budget program. 31 U.S.C. § 9103(c). The President then must include it as part of the budget submitted to Congress under 31 U.S.C. § 1105. Id. For OMB's guidance, see OMB Circ. No. A-11, §§ 32, 34.4, 36.3 (1998). For examples of what this all looks like in real life, see Appendix to the Budget of the United States Government for Fiscal Year 1999, at 92 (Federal Crop Insurance Corporation), 98 (Commodity Credit Corporation), 642 (Pension Benefit Guaranty Corporation), and 1141 (Tennessee Valley Authority).

Congress then considers the budget programs for wholly owned government corporations along with the rest of the federal budget, which includes, as and to the extent necessary or appropriate, making appropriations as authorized by law; making corporate financial resources available for operating and administrative expenses; and providing for repaying capital and the payment of dividends. 31 U.S.C. § 9104. Section 9104 does not prevent a corporation from carrying out or financing its activities as authorized by some other law, nor does it affect the corporation's authority to make commitments without fiscal year limitation. 31 U.S.C. § 9104(b). An example of a budget approval provision is the following, from the 1998 Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, 111 Stat. 1425, 1439 (1997):

> "The Saint Lawrence Seaway Development Corporation is hereby authorized to make such expenditures, within the limits of funds and borrowing authority available to the Corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by [31 U.S.C. § 9104], as may be necessary in carrying out the programs set forth in the Corporation's budget for the current fiscal year."

The statute then goes on to appropriate funds to the Corporation from the Harbor Maintenance Trust Fund.

[130]The source provision is much clearer on this point. See GCCA, § 102, 59 Stat. 598. Section 102 also uses the terms "budget program" and "plan of operations," which appear to be synonymous with "business-type budget" for GCCA purposes.

The President may include with the budget submission a recommendation that a wholly owned corporation be treated as a non-corporate agency for fiscal purposes. If Congress approves, the corporation retains its corporate identity, but is thereafter subject to the laws governing "appropriations, expenditures, receipts, accounting, and other fiscal matters" in the same manner as non-corporate agencies. 31 U.S.C. § 9109. (The quoted language comes from the source provision, GCCA § 107, 59 Stat. 599.)

Sections 9103, 9104, and 9109 apply only to wholly owned corporations. The exclusion of mixed-ownership corporations was deliberate. The legislative history explains the rationale.

> "The budget provisions of the bill do not apply to the mixed-ownership corporations in which private stockholders have an interest in the net worth and in the profits or losses of the corporations." S. Rep. No. 79-694, at 7 (1945).

See also H.R. Rep. No. 79-856, at 7 (1945). Although subsequent changes in the nature of government corporations have made this premise inapplicable in many cases, the fact remains that the budget provisions apply only to wholly owned corporations.

The only budget-related provision of the Government Corporation Control Act applicable to mixed-ownership corporations was relocated as part of the 1982 recodification of Title 31 and is now found at 31 U.S.C. § 1105(a)(24). It provides that the President's budget submission to the Congress may include—

> "recommendations on the return of Government capital to the Treasury by a mixed-ownership corporation (as defined in section 9102(2) of this title) that the President decides are desirable."

(4) Other financial controls

While the corporation control legislation was being considered, the Treasury Department was urging that all government funds should be kept in the Treasury. The statute addressed this concern in what is now 31 U.S.C. §§ 9107(b) and (c). Subsection (b) requires that the accounts of all government corporations, both wholly owned and mixed-ownership, be kept in the Treasury. However, if the Secretary of the Treasury approves, they may be kept in a Federal Reserve Bank, or a bank designated as a depositary or fiscal agent of the United States. Treasury is authorized to waive these requirements.

Such an account might include, for example, a corporate checking account whose checks would be signed by authorized corporation officials accountable directly to the board of directors. E.g., B-68830, October 6, 1947.

Subsection (c) exempts the following:

- A temporary account of not more than $50,000 in one bank.
- A mixed-ownership corporation from which government capital has been entirely withdrawn, during the period it remains without government capital.
- Certain specified farm credit institutions, which are nevertheless required to report to Treasury annually the names of depositaries in which their accounts are kept.

Congress regarded these provisions as "both practical and desirable as a matter of fiscal policy" (S. Rep. No. 79-694, at 11), and felt that they would "contribute toward a unification of the [government's] depositary system" (H.R. Rep. No. 79-856, at 10).

Three years later, in 1949, Congress added what is now 31 U.S.C. § 9107(a), which authorizes government corporations, with the Comptroller General's concurrence, to consolidate their cash, from whatever source, including appropriations, into one or more accounts for banking and checking purposes. Of course, the funds are to be used only for authorized purposes.[131] In reviewing a proposal under this provision, GAO's concern is the diminution of internal controls. E.g., B-58312, November 14, 1950 (approving an unspecified proposal by the Tennessee Valley Authority because it would simplify procedures without lessening internal controls).

Unless specifically authorized by statute, a corporation maintaining an account in the Treasury under 31 U.S.C. § 9107(b) is not entitled to receive interest on those funds, directly or indirectly. B-114839-O.M., January 9, 1976. (The device tried in that case was an offsetting credit for imputed interest.)

[131] Independent Offices Appropriation Act, 1950, Pub. L. No. 81-266, § 309, 63 Stat. 631, 662.

The law also includes provisions, which we will address later, dealing with Treasury control over the debt obligations of government corporations.

(5) Audit

In the 1940s, any discussion of government auditing meant auditing by the General Accounting Office. The original Government Corporation Control Act essentially incorporated the audit provisions of the George Act, which had been enacted less than a year earlier. Under these provisions, GAO was to audit annually every wholly owned government corporation and every mixed-ownership government corporation for any period in which government capital was invested in it, and report the results to Congress. GCCA §§ 105, 106, 202, 203, 59 Stat. 599-600.

The audit was to be a "commercial-type audit" rather than the customary governmental audit. The legislative history explained:

"The Comptroller General and the Congress have recognized that the regular governmental type of audit may not be suitable to the operations of a Government corporation. In general, the purpose of the governmental type of audit is to determine the validity of expenditures under appropriations made by the Congress in the light of restrictions and limitations placed by the Congress generally upon expenditures from appropriated funds . . . . On the other hand, the commercial type of audit, as applied to a business corporation, is separate and distinct from the accounting system and internal financial controls of the corporation, and is designed to determine the financial condition of the corporation as of a given date and the results of its financial operations during the period under audit, and to establish whether the corporate funds have been regularly expended in accordance with corporate authorization." H.R. Rep. No. 79-856, at 7-8.

For further elaboration, see pages 95-96 of the House report and S. Rep. No. 79-694, at 8-9. In 1975, the audit requirement was reduced from every year to at least once every three years.[132] GAO's auditing of government corporations, first under the George Act and then under the Control Act, is widely credited with providing the stimulus

[132]General Accounting Office Act of 1974, Pub. L. No. 93-604, § 601, 88 Stat. 1959, 1962.

for GAO to modernize its audit concepts and practices from the old "voucher auditing" system.[133]

The Government Corporation Control Act's audit and reporting provisions were completely overhauled by section 305 of the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838, 2853, 31 U.S.C. §§ 9105 (audits) and 9106 (management reports). The audit is to be conducted by the corporation's Inspector General or by an independent external auditor chosen by the Inspector General. For a corporation that does not have an Inspector General, the head of the corporation selects the independent auditor. 31 U.S.C. § 9105(a)(1). The audit is to be conducted "in accordance with applicable generally accepted government auditing standards." 31 U.S.C. § 9105(a)(2). This means the standards set forth in GAO's so-called "yellow book," Government Auditing Standards (1994). These differ from the more commonly known "generally accepted auditing standards" in that the government auditing standards require reporting on internal controls and compliance with laws and regulations. Government Corporations: CFO Act Management Reporting Could Be Enhanced, GAO/AIMD-94-73, at 4 n.2 (September 1994). Audit reports are to be submitted to the head of the corporation and to the Government Operations/Governmental Affairs Committees. 31 U.S.C. § 9105(a)(3).

The revised 31 U.S.C. § 9106 requires each government corporation to submit a management report each fiscal year to Congress, with copies to the President, the Director of OMB and the Comptroller General. The management report must include statements of financial position, operations, cash flows, a reconciliation to the corporation's budget report where applicable, a statement on internal accounting and administrative control systems, the report regarding the audit of the corporation's financial statements, and any other comments and information necessary to inform Congress about the operations and financial condition of the corporation.

[133]See Frederick C. Mosher, The GAO: The Quest for Accountability in American Government, 105-08 (Westview Press, 1979); Ellsworth H. Morse, Jr., The Government Corporation Control Legislation of 1945, 10 GAO Rev. 11 (No. 4, 1975). GAO had long wanted the authority to audit government corporations. One of its first products under the Control Act was a 10-volume report on the audit of the Reconstruction Finance Corporation and its subsidiaries. Mosher at 108; Morse at 15.

Nothing in 31 U.S.C. § 9105 specifies the timing of the audits, but, as noted, section 9106 requires the annual management report to include the report of the audit conducted under section 9105. Thus, audit frequency returned to annual, and in this sense the 1990 legislation can be said to have strengthened the audit requirement. See GAO/AIMD-94-73, at 3. Sections 9105 and 9106 do not distinguish between wholly owned and mixed-ownership corporations.

The 1990 revision of 31 U.S.C. § 9105 shifted primary responsibility for auditing government corporations from GAO to the Inspectors General. GAO continues to have a role, however. GAO may (1) review any audit conducted under subsection (a)(1), reporting its results to Congress, OMB, and the head of the corporation, and (2) may conduct its own financial statement audit at the discretion of the Comptroller General or at the request of a congressional committee. 31 U.S.C. § 9105(a)(4).

The original Corporation Control Act prohibited government corporations from using their funds to pay for private audits. GCCA § 301(d), 59 Stat. 601. This was intended to prevent duplication of efforts during the time that the law required GAO to conduct the audits. B-205488-O.M., January 19, 1982. Since the statute now explicitly permits the use of external auditors, this prohibition was dropped. However, the concern over duplication is reflected in 31 U.S.C. §§ 9105(a)(4) and (c). Subsection (a)(4) provides that an audit by GAO under that subsection will be in lieu of the otherwise required Inspector General audit. Under subsection (c), the GAO audit will also be in lieu of any GAO financial transaction audit required under any other law.

Subsection (c) recognizes that other laws include specific audit requirements for GAO to carry out. It provides that Comptroller General audits made under section 9105 are “in lieu of” any audit of a government corporation that is required by another law. Id. Reconciling Control Act audits with other statutory audits is largely an exercise in common sense. For example, where other legislation requires GAO to conduct annual audits of a corporation’s financial statements, the audits serve the purposes of section 9105 as well, obviating the need for the Inspector General audit. B-239201.3, July 25, 1991. An enabling act provision authorizing or directing GAO to audit the “operations” of a corporation gives GAO broad discretion over how to conduct that audit. While such a requirement can be satisfied by a financial audit, it can also extend to a full program audit. B-200951-O.M., December 24, 1980, as clarified by B-200951-O.M., May 11, 1981.

A GAO audit under the Government Corporation Control Act is financed initially from GAO's own appropriations, but its "full cost. . . as determined by the Comptroller General" must be reimbursed by the corporation. 31 U.S.C. §9105(a)(5).[134] The purpose of the reimbursement requirement is to prevent government corporations from receiving a hidden subsidy from the taxpayers. B-207203-O.M., June 4, 1982. "Full cost," GAO has determined, includes both direct costs (employee salaries and travel expenses, for example) and indirect costs, including overhead. B-207203-O.M., supra; B-96792, August 10, 1950 (in which GAO billed Federal Prison Industries for every last penny in its administrative expense allocation). Subsection (a)(5) further requires that the reimbursements be deposited as miscellaneous receipts. This was superseded by a seemingly permanent proviso attached to GAO's appropriation in the Legislative Branch Appropriations Act, 1995, Pub. L. No. 103-283, 108 Stat. 1423, 1440 (1994), permitting GAO to credit the reimbursements to its then-current appropriation, to remain available until expended. Congress can then, as it did in Pub. L. No. 103-283, appropriate a specific sum from the "no-year" account for use during the current fiscal year.

The original Control Act authorized GAO's audit reports to include essentially the items now included by the corporations in their management reports, plus several other things, such as any impairments of capital, any recommendations for the return of government capital, and any transactions or expenditures believed to be illegal. GCCA §§ 106 and 203, 59 Stat. 599-600. That reporting requirement displaced GAO's authority to disallow corporate expenditures. B-58302, April 29, 1947; 37 Comp. Gen. 666, 668-69. The reporting language currently contained in the GCCA, in 31 U.S.C. § 9105(a)(4)(B), is more general—GAO shall report "the results of the review and make any recommendation [it] considers

[134]Mandatory reimbursement originated with language in GAO's appropriation in the First Deficiency Appropriation Act for 1945, Pub. L. No. 79-40, 59 Stat. 77, 81, enacted just two months after the George Act.

appropriate." It certainly is broad enough to include the elements the 1945 law specified.

When GAO makes an audit recommendation to the head of an agency, the agency head must, within specified time limits, submit a written report on the action taken on the recommendation to certain congressional committees. 31 U.S.C. § 720(b). For purposes of this requirement, "agency" includes wholly owned, but not mixed-ownership, government corporations. 31 U.S.C. § 720(a); B-114831-O.M., July 28, 1975 (requirement for compliance report not applicable to Federal Deposit Insurance Corporation).

b. Appointment and Control of Directors

A government corporation's management, like its other key features, is determined by its enabling legislation. For the great majority of corporations, this means a board of directors. However, there is no statutory model for government corporations, nor is there any legal requirement for a board of directors.

The need for a board of directors has been questioned from the managerial perspective, as well. For example, Dr. Moe has written:

> "Even the use of the term 'corporation' is unfortunate because it tends to encourage improper borrowing of concepts from the private sector. For instance, there is no particular reason for government corporations to have boards of directors, yet this feature is found in most proposals for new corporations apparently because corporations in the private sector have boards of directors."[135]

Dr. Seidman agrees, quoting a Brookings Institution report to the effect that "there appears to be nothing inherent in the corporate form of organization to require a board instead of a single administrator."[136] There are, of course, opposing views. According to Marshall Dimock, an early observer of government corporations, "[a]n effective board of directors is the key to program success."[137]

[135]Moe 1983, supra note 48, at 3-4.

[136]Seidman 1952, supra note 42, at 92.

[137]Marshall E. Dimock, Government Corporations; A Focus of Policy and Administration (Part I), 43 Am. Pol. Sci. Rev. 899, 915 (1949).

The federal government's involvement in the selection or appointment of directors has evolved along with the development of government corporations. As we have seen, the United States' initial participation in the creation of government corporations involved chartering of the entity and ownership of stock. However, with the creation of the Second Bank of the United States in 1816, the President was authorized to appoint, by and with the consent of the Senate, 5 of the Bank's 25 directors, the rest to be elected annually by shareholders other than the United States. During the 19th century, the federal government "continued to charter private corporations . . . but only once participated in such a venture itself," that being, the Union Pacific Railroad. Lebron v. National R.R. Pass'r Corp., 513 U.S. 374, 387 (1995). The Union Pacific Railroad was chartered in 1862 with the President appointing two of its directors. Act of July 1, 1862, ch. 120, § 1, 12 Stat. 489, 491.

The 20th century saw considerable variation in managerial structure, mostly within a framework of increased government involvement. In 1902, as part of the statute authorizing construction of the Panama Canal (32 Stat. 481), Congress authorized the President to purchase all stock and property of the Panama Railroad Company, making the government the sole shareholder. The Secretary of War, as holder of the stock, appointed all of the company's directors. According to Lebron (513 U.S. at 387), this was the first instance in which the government appointed a majority of directors.

The most common management system, at least with respect to corporations subject to the Government Corporation Control Act, is a board of directors, all of whom are appointed by the President. The typical statutory provision will (1) vest the corporation's management and control in the board of directors, (2) prescribe the number of directors and how they are to be appointed, (3) specify what will constitute a quorum, (4) set forth the powers and duties of the directors, and (5) address their compensation. E.g., 22 U.S.C. § 2193(b) (Overseas Private Investment Corporation). In addition, the statute may (1) specify the number of directors to come from various sources (government, industry, etc.), or prescribe other qualifications, (2) designate certain government officials to serve ex officio, and (3) address the board's political composition. Additional examples of government corporations all of whose directors are appointed by the President are the African

Development Foundation,[138] Commodity Credit Corporation, Export-Import Bank, and the Tennessee Valley Authority.[139] In one instance, the directors are appointed by a department head. See 7 U.S.C. § 1505(a) (Federal Crop Insurance Corporation's directors appointed by Secretary of Agriculture). The Tennessee Valley Authority legislation includes an interesting qualification: directors must "profess a belief in the feasibility and wisdom" of the TVA Act of 1933. 16 U.S.C. § 831a(h).

When Congress wants the federal government to participate more actively in the management of a government corporation and to ensure that the government's views and interests are represented, the enabling statute designates specified officials to serve as directors ex officio. These are usually heads of departments or agencies with a logical subject-matter relationship to the corporation. For example, two of the five directors of the Federal Deposit Insurance Corporation are the Comptroller of the Currency and the Director of the Office of Thrift Supervision. 12 U.S.C. § 1812. Sometimes, Congress also takes the next step and makes all of the directors government officials. E.g., 29 U.S.C. § 1302(d) (directors of the Pension Benefit Guaranty Corporation are the Secretaries of Labor, Treasury, and Commerce).

Cabinet members serving ex officio may delegate their directorial functions even though the enabling statute does not expressly authorize it. 6 Op. Off. Legal Counsel 257 (1982). This follows from the nature of ex officio service. Such appointments are made "based not on individual personal attributes, but on the contribution Congress believed each one's agency could make to the [corporation's] operations." Id. at 260.

Another way the government can exert management influence or control is to designate a corporation as an entity within a particular

[138]The African Development Foundation is not listed in the Government Corporation Control Act, but its enabling legislation makes it subject to the Act's provisions for wholly owned corporations. See 22 U.S.C. § 290h-6.

[139]Our source for these examples is Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14 (December 1995). The information for each corporation includes a "management structure" summary and a citation to the corporation's enabling legislation.

department or agency and under the control of the head of that department or agency. For example, the Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture" (15 U.S.C. § 714); the Saint Lawrence Seaway Development Corporation is "subject to the direction and supervision of the Secretary of Transportation" (33 U.S.C. § 981); the Overseas Private Investment Corporation is "an agency of the United States under the policy guidance of the Secretary of State" (22 U.S.C. § 2191); Federal Prison Industries, Inc. is in the Department of Justice (Reorg. Plan No. 2 of 1939, § 3(a), 5 U.S.C. App. I.) Each alternative—departmental placement or independence—has its supporters and there is no clear winner. The 1981 report of the National Academy of Public Administration recommended that government corporations "should normally be placed under the head of a cabinet department,"[140] but this has not been followed. Moe concludes that government corporations "may be placed virtually anywhere in the executive establishment. Organizational placement is not a distinguishing element for government corporations."[141]

The enabling legislation will also provide for officers of the corporation. In probably the majority of instances, they are appointed by the President of the United States (e.g., 22 U.S.C. § 2193, Overseas Private Investment Corporation), but in others they are appointed by the board of directors (e.g., 16 U.S.C. § 831b, TVA). Whether the board of directors or the "chief executive officer" is the "head" of the corporation depends on the statutory powers given to each. If the enabling legislation vests management and control in the board of directors, the "head" of that corporation, unless the statute provides differently, is the board of directors collectively, that is, acting as a body. 25 Comp. Gen. 467 (1945). In contrast is the Corporation for National and Community Service. It has a board of directors (42 U.S.C. § 12651a), but the law further specifies that the Corporation "shall be headed by [a] Chief Executive Officer . . . appointed by the President" (42 U.S.C. § 12651c).

[140]NAPA 1981, supra note 51, at 61.

[141]Moe 1995, supra note 41, at 50.

A board of directors can delegate power to an executive committee, but this has been construed to mean ordinary and routine matters, not radical departures from corporate policy. B-58302-O.M., September 14, 1949. This device cannot be used, however, to avoid a statutory quorum requirement. See B-197710-O.M., January 14, 1983. In that case, a government corporation had only two directors out of five, and the statute designated a majority of the board as a quorum. Under the circumstances, GAO thought it unlikely that a court would support treating those two directors as an executive committee. The answer would of course be different if the statute permitted a majority of board members currently in office to constitute a quorum. Id.

As noted earlier, while the overwhelming majority of government corporations have boards of directors, a few do not. Moe identified three which, at the time he wrote, did not have boards of directors—Government National Mortgage Association, Resolution Trust Corporation (since terminated), and Saint Lawrence Seaway Development Corporation.[142] Another such corporation that was later created is the Community Development Financial Institutions Fund. Its management consists of a presidentially-appointed Administrator and advisory board. 12 U.S.C. § 4703.[143]

The appointment of most or all of a board of directors is most appropriate for corporations owned or controlled by the United States. When you move further and further away from this model, the government's managerial involvement—usually, but not always—diminishes. For example, in the typical government-sponsored enterprise, the government will appoint some directors to make sure its voice will be heard, but the majority is appointed by non-government sources. Thus, the President appoints 5 out of 18

[142]Id. at 58.

[143]For a couple of years in the mid-1990s, this provision was overridden by an appropriation act proviso which made the Secretary of the Treasury the Administrator and placed the Fund in the Treasury Department. E.g., Pub. L. No. 104-134, 110 Stat. 1321, 1321-94 (FY 1996). The proviso was dropped in fiscal year 1997. See Pub. L. No. 104-204, 110 Stat. 2874, 2907 (1996).

Fannie Mae directors, 5 out of 18 for Freddie Mac, 5 out of 15 for Farmer Mac, and 7 out of 21 for Sallie Mae.[144]

One would expect a minimal federal managerial role in a federally-chartered corporation expressly designated as not an agency or instrumentality of the United States. For example, the Communications Satellite Corporation (Comsat) was created by the Communications Satellite Act of 1962, Pub. L. No. 87-624, tit. III, 76 Stat. 419, 423, to develop a commercial communications satellite system. It is expressly designated a "for profit" corporation and not an agency or establishment of the United States. 47 U.S.C. § 731. Befitting this status, Comsat was capitalized entirely with private funds.[145] However, it was clearly intended to operate with government-conferred advantages. The statute declared that the United States participation in the global communications network would be through Comsat, "subject to appropriate governmental regulation," whatever that means. 47 U.S.C. § 701(c). The law also directed agencies such as the National Aeronautics and Space Administration, the Federal Communications Commission, and the Department of State, to provide technical advice, cooperation in research and development, and other services to Comsat. 47 U.S.C. §§ 721, 742.

Comsat has a 15-member board of directors, only three of whom are government-appointed, the rest being elected by private shareholders. 47 U.S.C. § 733. The Attorney General determined that the presidentially-appointed directors held private posts and were not officers of the United States. 40 Op. Att'y Gen. 165 (1962). As such, these directors would owe their primary fiduciary obligation to the corporation, not the Government. Id. at 171. These directors would not necessarily represent the views of the President, or the public interest beyond that ordinarily expected of directors of a private corporation, although they certainly could do so. Id.

[144]Our source for these examples is Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991).

[145]Leazes, supra note 44, at 25-26.

In terms of the government's managerial role, somewhere in between the wholly owned corporation model and the Comsat model are the Corporation for Public Broadcasting and the Legal Services Corporation. Both are chartered as nonprofit corporations and are not to be regarded as agencies or establishments of the United States. See 47 U.S.C. § 396(b); 42 U.S.C. §§ 2996b and 2996d(e)(1). Neither is subject to the Government Corporation Control Act. Nevertheless, perhaps because both are federally-funded as well as federally-created and perform essentially governmental rather than commercial functions, their entire boards of directors are appointed by the President. 47 U.S.C. § 396(c); 42 U.S.C. § 2996c.

5. Sources of Funds and Financing

There is no single model for the funding structure of a government corporation. The corporate form alone does not dictate any particular type of funding. Just as with the corporation's organization and powers, its funding structure varies according to its purpose and activities as reflected in the enabling legislation. As one court has noted, "Congress is not limited by traditional notions of corporate powers and organization" and it "need not capitalize corporate instrumentalities of the United States in any rigidly prescribed manner."[146] United States v. Nowak, 448 F.2d 134, 138 (7th Cir. 1971). In fact, Congress has funded government corporations using a variety of sources and methods: direct appropriation of funds, federal borrowing, charges or user fees for services provided to the public, federal ownership of stock, and private investment or financing (e.g., sale of debt securities) with actual or implied backing by the United States, or some combination of these methods.

a. Types of Financing: Government

(1) Direct appropriations

One funding option is the direct appropriation of funds from the general fund of the Treasury, exactly the same as for an unincorporated agency. In its 1995 study, Government Corporations: Profiles of Existing Government Corporations, GAO found that, out of 24 corporations then listed in the Government Corporation

[146]"Capitalize" in this context means simply "to furnish with capital, to provide capital for the [corporation's] operation." B-24827, April 3, 1942, at 11.

Control Act, 15 had received federal appropriations in fiscal year 1994. GAO/GGD-96-14, at 21-22. As a general proposition, wholly owned corporations were more likely to receive direct appropriations than mixed-ownership corporations, although some mixed-ownership corporations received appropriations while some wholly owned corporations did not. In addition, several corporate entities not subject to the Control Act received appropriations. Id.

Direct appropriations may provide all or part of a corporation's funding. Examples of government-created corporations fully funded by congressional appropriations are the Corporation for National and Community Service and the Legal Services Corporation.[147] Fully-funded corporations tend to be those with non-commercial functions. There is no nexus between full funding status and inclusion or exclusion from the Government Corporation Control Act. For example, the Corporation for Community Service is subject to the act, while Legal Services is not. An example of partial appropriations funding is the Commodity Credit Corporation. Largely because the CCC administers a variety of relatively high-risk programs, the typical year produces nonrecoverable losses which are funded from a "net realized losses" appropriation.[148] Congress may provide appropriations for certain start-up costs, with the expectation that private financing will then take over. An example is discussed in 69 Comp. Gen. 289 (1990) (Pennsylvania Avenue Development Corporation could amortize construction consultants' fees as a cost of construction because they were not the kind of start-up costs for which Congress had provided appropriations).

Congress can structure a corporation's appropriation however it wishes. The appropriation cited above for the Corporation for National and Community Service is a simple lump sum; that for the Legal Services Corporation is a lump sum with a few earmarks.[149] At

[147]See, respectively, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, 111 Stat. 1467, 1509 (1997), and the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat, 2440, 2510 (1997).

[148]E.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-86, 111 Stat. 2079, 2091 (1997).

[149]See note 147, supra.

what is perhaps the other extreme, at least for a government corporation, the 1988 appropriation for the Commodity Credit Corporation's operating expenses consisted of 17 line items, plus limited transfer authority.[150] The import of lump-sum and line-item appropriations in this context is no different than it is for unincorporated agencies.

Most corporate appropriations are definite in amount; some are not. For example, the Federal Crop Insurance Corporation's 1998 appropriation to the FCIC Fund was "such sums as may be necessary, to remain available until expended," i.e., an indefinite, no-year appropriation.[151] The Commodity Credit Corporation (CCC) is authorized to receive its "net realized losses" appropriation on a "current, indefinite" basis. 15 U.S.C. § 713a-11. This is merely an authorization, however, and Congress remains free to structure the appropriation some other way. 67 Comp. Gen. 332 (1988). The CCC's 1998 appropriation was a current, indefinite appropriation ("[f]or fiscal year 1998, such sums as may be necessary"), but subject to a monetary ceiling.[152] Since the CCC receives a direct appropriation for net losses, it is logical that net gains, should they ever occur, be deposited in the Treasury as miscellaneous receipts, and this is what the law requires. 15 U.S.C. § 713a-12. Cf. Knowles v. War Damage Corp., 171 F.2d 15, 19-20 (D.C. Cir. 1948) (not illegal for a statute to require a government corporation to pay its surplus funds into the Treasury).

(2) Federal borrowing

Another funding method for the government corporation is borrowing authority, also known as public debt financing. This means the authority to borrow money from the Treasury and to issue obligations to the Treasury to evidence the indebtedness. This authority must be conferred by statute. Examples include 29 U.S.C. § 1305(c) (Pension Benefit Guaranty Corporation), 15 U.S.C. § 713a-4 (Commodity Credit Corporation), and 7 U.S.C. § 947 (Rural

[150]Pub. L. No. 100-202, 101 Stat. 1329, 1329-335 (1987).

[151]Pub. L. No. 105-86, supra note 148, 111 Stat. at 2091.

[152]Id.

Telephone Bank). The Pension Benefit Guaranty (PBGC) provision just cited is fairly typical:

"The [PBGC] is authorized to issue to the Secretary of the Treasury notes or other obligations in an aggregate amount of not to exceed $100,000,000, in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury . . . . The Secretary of the Treasury is authorized and directed to purchase any notes or other obligations issued by the [PBGC] under this subsection."

Some borrowing provisions, like the PBGC statute, have a fixed dollar ceiling. Others have a variable ceiling, like 7 U.S.C. § 947(a) (amount borrowed by Rural Telephone Bank which is outstanding at any one time "shall not exceed twenty times the paid-in capital and retained earnings" of the Bank). Unused borrowing authority is a form of contingent liability. United States v. Nowak, 448 F.2d 134, 138 n.4 (7th Cir. 1971). In determining the amount of unused borrowing authority, a corporation may exclude interest on outstanding obligations already held by the Treasury. B-89366-O.M., September 9, 1964. If a contrary congressional intent can be established, however, the answer will be different. See B-125007/ B-127378, July 20, 1956.

Treasury may be required to purchase the obligations, as in the PBGC provision quoted above, or may have discretion in the matter as is the case for the Commodity Credit Corporation and the Rural Telephone Bank (15 U.S.C. § 713a-4, 7 U.S.C. § 947(b), respectively). Congress may specify the time period in which the borrowing authority must be used. If it does not, the authority remains available until used or repealed. See Nowak, 448 F.2d at 138 n.4.

In lieu of direct borrowing from the Treasury, it may be possible to go through an intermediary, the Federal Financing Bank (FFB). The FFB was created in 1973 to coordinate federal and federally assisted borrowings and thereby hopefully reduce their costs. 12 U.S.C. § 2281. The FFB is itself a corporate entity under the general direction and supervision of the Secretary of the Treasury, and an instrumentality of the United States. 12 U.S.C. § 2283. While not listed in the Government Corporation Control Act, the FFB is subject to the act's budget and audit provisions for wholly owned government corporations. 12 U.S.C. § 2293. For present purposes, two provisions of the act creating the FFB are relevant. Under

12 U.S.C. § 2285(a), "[a]ny Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the [FFB]." "Federal agency" includes "a corporation or other entity established by the Congress which is owned in whole or in part by the United States." 12 U.S.C. § 2282(1). Thus, at least certain corporations with statutory borrowing authority can issue their obligations directly to the FFB, which can then issue its own securities either in the private market or, more likely, to the Treasury. 12 U.S.C. § 2288.

In 14 Op. Off. Legal Counsel 20 (1990), the Justice Department's Office of Legal Counsel tackled the question of how to determine which corporations could avail themselves of the FFB. A detailed analysis led the OLC to conclude that Congress intended to include corporations "that receive substantial funding from the government, that are subject to significant federal control, and that issue obligations guaranteed by the federal government." Id. at 26. This being the case, corporations "that are wholly privately funded, that have a significant measure of independence in their management, and that issue obligations not backed by the full faith and credit" of the United States are excluded. Id. OLC recognized that a given corporation may not have all of the principal characteristics of either the included or excluded corporations, or may have a mix. The approach in such a case is to determine "whether the corporation's principal characteristics render it most analogous to those corporations that were intended to be covered by the [law creating the FFB] or to those that were not." Id. at 26 n.14. Applying this analysis, OLC concluded that the former Resolution Trust Corporation was a federal agency for purposes of 12 U.S.C. § 2282(1), and could therefore issue promissory notes directly to the FFB.

In two opinions to Members of Congress, GAO reviewed the financing arrangements for building construction at the government-owned Federal Triangle site in the District of Columbia. The former Pennsylvania Avenue Development Corporation, a wholly owned government corporation, was responsible for the planning, development, and construction oversight of the project. The original plan was to obtain private financing for the construction. It was later decided, however, that financing through the FFB would save the government interest costs. The project's trustee obtained the financing through a promissory note issued to the FFB, and secured by the trustee's assignment to the FFB of the trustee's rights to receive statutorily-required rental payments from the General Services Administration. GAO concluded that the FFB was an appropriate source of financing because the Federal Triangle building—designated the Ronald Reagan Federal Building—was fundamentally a project being constructed by the federal government. Several factors supported this conclusion. The federal government, by statute, bore the full risks of developing and owning the project; the land on which the project was being built belonged to the United States; and the government carried the principal rights and obligations associated with ownership of the project, including the project's design and specifications for construction. The Pennsylvania Avenue Development Corporation most likely would have met the Justice Department's eligibility criteria, except that there was no need to apply that test because, under the Federal Triangle legislation, the promissory note issued for financing purposes was in effect an obligation of GSA rather than the Corporation. B-248647, December 28, 1992; B-248647.2, April 24, 1995.

As the 1995 opinion pointed out, a corporation (or unincorporated agency, for that matter) with statutory borrowing authority does not need further specific authority to use the FFB. The provisions of the law creating the FFB noted above supply the necessary authority. B-248647.2, supra, at 3.

(3) Federal ownership of stock

The federal government has also funded government corporations by owning part or all of a corporation's capital stock. As we saw in our historical summary above, the government's early involvement in government corporations consisted of purchasing stock in the name of the United States. In the case of the Panama Railroad Company, the government acquired the entire capital stock of a private corporation, elected its board of directors, and used it to carry out commerce and defense functions in the Panama Canal. See New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937).

Of the modern (post-Corporation Control Act) government corporations, some issue stock, many do not. A government corporation issues stock if it is authorized to do so in its enabling legislation. The statute will specify the amount of stock that may be issued and who may or must subscribe to it. For example, the federal government owns 100% of the capital stock of the Commodity Credit Corporation (15 U.S.C. § 714e), the Export-Import Bank (12 U.S.C. § 635b), and the Federal Crop Insurance Corporation (7 U.S.C. § 1504(a)). The Rural Telephone Bank is authorized to issue three classes of stock, one owned by the government, one by loan recipients, and one by specified classes of purchasers. 7 U.S.C. § 946.

b. Types of Financing: Private

(1) Sources of private financing

Private financing can take one of three forms: fees and charges, stock ownership, and borrowing. For the most part, authority to assess fees and charges will be spelled out in the pertinent legislation. The kinds of receipts vary with the type of program being administered. The Tennessee Valley Authority receives income from the sale of electric power (including sales to government agencies, 44 Comp. Gen. 683 (1965)). The Pension Benefit Guaranty Corporation collects premiums from sponsors of covered pension plans. 29 U.S.C. § 1306. The St. Lawrence Seaway Development Corporation for many years received its income from tolls (33 U.S.C. § 988; 35 Comp. Gen. 267 (1955)), but Congress suspended this authority with respect to commercial vessels in 1994 (33 U.S.C. § 988a), and began funding the Corporation from the Harbor Maintenance Trust Fund. See 33 U.S.C. § 2238 and 26 U.S.C. § 9505. The Panama Canal Commission's revolving fund received toll receipts and was authorized to retain interest generated by amounts deposited in financial institutions outside the Treasury. 22 U.S.C. § 3712; B-280951, December 3, 1998.

If there is no express authority, it may nevertheless be possible for a corporation to assess fees under 31 U.S.C. § 9701, the so-called "user charge statute," covered in detail in Chapter 15. Section 9701 by its terms applies to wholly owned, but not mixed-ownership, government corporations. The limitation to wholly owned corporations is because they are the closest to regular government agencies. This does not mean that other types of government-created corporations may not charge fees, merely that they must find the authority elsewhere.

A government-created corporation designated as private may also find itself on the other end of the transaction—having to pay government agencies for services rendered to it. For example, the Communications Satellite Act authorizes certain services to be provided to Comsat on a reimbursable basis, but does not further address how the charges are to be determined. Absent anything to the contrary in the law or its legislative history, GAO found it legitimate to determine the charges in accordance with the standards under 31 U.S.C. § 9701. B-168707-O.M., May 11, 1970.

A statutory authorization may also be a limitation. The Export-Import Bank, for example, is authorized to charge fees for conferences, seminars, and publications. 12 U.S.C. § 635(a)(1). Then, similar to authority given to the executive branch generally, the statute authorizes the Bank to accept voluntary contributions for travel and subsistence expenses incurred by its officers or employees. Given this structure, GAO found that the statute does not authorize the Bank to require its customers to pay the travel and subsistence expenses. B-272254, March 5, 1997.

The second form of private financing is private subscription to stock. Naturally, one would not expect to find this in the case of a wholly owned government corporation, but it is a theoretical option for Congress to consider for mixed-ownership corporations, and is commonly found in government-sponsored enterprises. Statutory provisions for GSEs may prescribe classes of common stock, voting and nonvoting stock, preferred stock, and may address institutional versus general subscription. Examples are 12 U.S.C. § 1453 (Freddie Mac); 12 U.S.C. § 2124 (Banks for Cooperatives); 12 U.S.C. § 2279aa-4 (Farmer Mac); and 20 U.S.C. § 1087-2(f) (Sallie Mae). The Justice Department has concluded that, as long as no statute prohibits it, a corporation can use preferred stock as a dividend to its shareholders of common stock. 9 Op. Off. Legal Counsel 19 (1985). (This case involved Freddie Mac, whose legislation later changed, but the point is still good.) Other federally-created corporations which are chartered as private may be stock (Comsat) or nonstock (Corporation for Public Broadcasting) corporations. As with the GSEs, the details are found in the enabling legislation. E.g., 47 U.S.C. § 734(a) (Comsat stock to be "sold in a manner to encourage the widest distribution to the American public").

The third type of private financing is borrowing—the issuance of promissory notes, bonds, or other debt obligations to the public. An example is 7 U.S.C. § 947, which authorizes the Rural Telephone

Bank to borrow from the public as well as from the Treasury. The Commodity Credit Corporation has comparable authority in 15 U.S.C. § 713a-4.

The obligations may be expressly guaranteed by the United States. Commodity Credit Corporation obligations, for example, "shall be fully and unconditionally guaranteed both as to interest and principal by the United States." Id. A question given much attention has been the extent to which obligations of government corporations are backed by the "full faith and credit" of the United States in the absence of express statutory direction. Attorney General opinions addressing whether a bond or other obligation is a valid obligation of the United States, even in the absence of full faith and credit language, are set forth and discussed in more detail in Chapter 11 under the head "Nature of the Government's `Obligation." It is sufficient here to note that two of the Attorney General's opinions concerned government corporations—42 Op. Att'y Gen. 21 (1961) (Development Loan Fund) and 42 Op. Att'y Gen. 327 (1966) (Export-Import Bank). In both cases the Attorney General concluded that Congress' choice of the corporate form did not alter the status of its obligations. GAO adopted the Attorney General's position in 68 Comp. Gen. 14 (1988) (promissory notes and assistance guarantees issued by the now-defunct Federal Savings and Loan Insurance Corporation were obligations of the United States).

Congress can include express disclaimer language in the statute, which will then of course control. E.g., 12 U.S.C. § 1721(b) (Ginnie Mae). If, however, the test for an obligation of the United States (as set out in the Attorney General's opinions) is met, disclaimer language found only in legislative history is not enough. 68 Comp. Gen. at 18-19.

As with borrowing from the Treasury, borrowing from the public can also be handled through the Federal Financing Bank. Indeed, individual agency offerings to the public were the main concern behind the law creating the Federal Financing Bank. See, in this regard, 12 U.S.C. § 2281. See also H.R. Rep. No. 93-299, at 2 (1973), reprinted in 1973 U.S.C.C.A.N. 3153, 3154-55.

(2) Market perception of implied backing by United States

"As one wag puts it: With GSEs, you privatize the profits and socialize the risk."[153]

The preceding discussion outlines when a government corporation's obligations may be backed by the full faith and credit of the United States. Government-sponsored enterprises (GSEs) are generally regarded as one step further removed from "government status" and, therefore, further removed from government backing, at least official backing. Of course, Congress is free to provide federal backing whenever it wishes. E.g., 12 U.S.C. § 2278b-6(d)(4)(A) (if Financial Assistance Corporation is unable to pay principal or interest on its obligations, Treasury is required to pay and try to recover from the defaulting bank). More often than not in the case of GSEs, however, Congress has enacted express disclaimers. For example, 12 U.S.C. § 4503 disclaims any federal guarantee of the obligations or liability of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks, and any implication that they are backed by the full faith and credit of the United States. (The Home Loan Banks are mixed-ownership government corporations; the other two are GSEs.)

Searching the statutes for guarantee or disclaimer language addresses only the presence or absence of a formal, "official" obligation. Even in the case of a disclaimer, virtually every analyst or commentator who has examined GSEs has emphasized the existence of a market perception of implied backing by the United States because, presumably, the GSE will not be allowed to fail. Dr. Moe states, very simply, that "[t]he Federal Government implicitly guarantees the value of GSE obligations and mortgage-backed securities."[154] This implicit guarantee has been called the "distinguishing characteristic"[155] of GSEs and their "most valuable

[153]Ronald C. Moe, The 'Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences, 54 Pub. Admin. Rev. 111, 113 (1994).

[154]Moe 1995, supra note 41, at 38.

[155]Moe and Stanton 1989, supra note 69, at 322; Ronald C. Moe, Liabilities of the Quasi Government, 20 Gov't Exec. 47, 49 (1988). Moe and Stanton, at 321, go so far as to include the implicit guarantee as an element of the definition of a GSE. See also Moe 1995, supra note 41, at 38.

perk."[156] Another writer suggests that in the event of GSE failure, the government would have "no real alternative but to deliver on the implicit guarantee" in order to avoid disruption in the credit markets.[157]

The implicit guarantee results from the facts that GSEs are regarded as instrumentalities of the United States, and their obligations have many of the characteristics of Treasury obligations.[158] As another commentator has pointed out, some of the most prominent private credit-rating agencies "have rated enterprise securities based on the strength of this implied government guarantee, in spite of the knowledge that no actual guarantee exists."[159]

This market perception of a federal guarantee confers significant economic benefits on GSEs. Primarily, it enables them to borrow money at rates much lower than private corporate obligations, and almost as low as the rates Treasury itself pays on its borrowings.[160]

(3) Statutory controls

In addition to the budget, audit, and account controls previously described, the Government Corporation Control Act, 31 U.S.C. § 9108, addresses the debt obligations of all government corporations, wholly owned and mixed-ownership, unless specifically exempted. Under subsection (a), a government corporation may not issue or offer obligations to the public unless the Secretary of the Treasury has approved[161] the form,

[156] Nitschke, supra note 68, at 1580.

[157] Froomkin, supra note 49, at 580.

[158] The common characteristics are listed in Stanton, supra note 70, at 404-05.

[159] Lavargna, supra note 69, at 1011.

[160] See, e.g., Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17, at 7 (February 1991); Lavargna, supra note 69, at 1010-11; Stanton, supra note 70, at 404.

[161] The 1982 recodification of Title 31 changed the original "approve" (see 59 Stat. 602) to "prescribe." We think "prescribe" could be a bit misleading in that it often is used to refer to the issuance of regulations, whereas "approve" clearly includes ad hoc action.

denomination, maturity, and interest rate of the obligations and the conditions to which they will be subject; the manner and times of their issuance; and the price for which they will be sold.

Under subsection (b), a government corporation must get the Secretary of the Treasury's approval (or waiver) before buying or selling either a direct obligation of the United States or an obligation whose principal, interest, or both, is guaranteed by the United States, if the obligations aggregate over $100,000.

Subsection (c) authorizes the Secretary of the Treasury to delegate functions under subsections (a) and (b) to any officer or employee of any federal agency.

Subsection (d) contains the exemptions. The approval requirements of subsections (a) and (b) do not apply to certain named mixed-ownership government corporations, nor to any mixed-ownership corporation from which government capital has been entirely withdrawn.

Finally, a provision added to the Control Act in 1986 directs the Secretary of the Treasury to issue standards for depositary institutions concerning the safeguarding and use of GSE securities that they hold for their customers. 31 U.S.C. § 9110.

6. Fiscal Autonomy

a. Account Settlement

GAO's "account settlement" authority refers to the first portion of 31 U.S.C. § 3526(a)—"The Comptroller General shall settle all accounts of the United States Government." During the pre-World War II period and for a while thereafter, this meant that all accounts had to be physically transmitted to GAO, where GAO auditors scrutinized them, line by line, "disallowing" or "taking an exception to" (they mean the same thing) expenditures found to be illegal. GAO's application of this authority underwent major evolution during the third quarter of the 20th century. Now, agencies retain their own accounts, keeping them available for audit,[162] and an

[162]GAO advised government corporations to this effect in 27 Comp. Gen. 429 (1948).

account is regarded as "settled" by operation of law after three years except for unresolved items. See 31 U.S.C. § 3526(c). While account settlement is nowhere near what it used to be, it is nevertheless relevant in determining such things as (1) the kinds of audit GAO is authorized to perform, (2) who may request a legal decision from GAO,[163] and (3) the application of the accountable officer relief statutes.

During the decades preceding enactment of the Government Corporation Control Act, the relationship of GAO to government corporations was a major battlefield. The corporations argued that they should be exempt from GAO's account settlement authority; GAO argued the opposite.[164] In 1927, the Supreme Court decided the case of United States ex rel. Skinner & Eddy v. McCarl, 275 U.S. 1 (1927). A contractor sought a writ of mandamus to compel GAO to consider its claim against the Emergency Fleet Corporation. The Court held that the claim was not within GAO's claims settlement jurisdiction. The executive branch seized on this case to declare as a blanket proposition that GAO's account settlement authority did not extend to government-owned corporations. E.g., 40 Op. Att'y Gen. 84 (1941). While this was certainly an arguable position, GAO's initial reaction was to distinguish Skinner & Eddy, pointing out that the Court had not directly ruled on that question. B-29072, November 16, 1943. GAO tried to reconcile the conflicting views, holding that accountable officers still had to render their accounts, but that GAO, in performing its settlement audit, would recognize the corporations' exemption from various laws. B-24827, May 22, 1942.

Two developments have largely resolved the issue. First was the enactment of the Government Corporation Control Act. As described earlier, the Control Act mandated a commercial-type audit—as opposed to the traditional governmental audit—and told GAO to include in its audit reports anything it believed to be illegal.

[163]In the early days, when large numbers of employees were poring over every account, GAO was more likely to turn down a request from an entity not within its account settlement jurisdiction. E.g., B-112540, November 25, 1952. In more recent times, as GAO has come to view its decision function more as providing a service, this has become less likely.

[164]Many of the squabbles are recorded in John McDiarmid, Government Corporations and Federal Funds (Univ. of Chicago Press, 1938).

Although some decisions reflect ambivalence,[165] GAO tended to view this as supplanting its account settlement authority with respect to corporations. E.g., B-58302, April 29, 1947 (former Reconstruction Finance Corporation); B-146820, June 2, 1967 (CCC), B-150556, May 29, 1968 (CCC); B-152534-O.M., December 4, 1963 (Panama Canal Company).

The second development was the refinement of certain charter provisions and a trend toward standardization. Congress has authorized most post-Corporation Control Act corporations to determine the character and necessity of their expenditures. An example is the Federal Crop Insurance Corporation provision:

> "The Corporation shall determine the character and necessity for its expenditures . . . and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other laws governing the expenditure of public funds and such determinations shall be final and conclusive upon all other officers of the Government." 7 U.S.C. § 1506(i).

There are variations in language. (The "final and conclusive" part is probably redundant.) GAO views the "character and necessity" provision as ousting its account settlement authority. E.g., B-226708.3, December 12, 1988 (former FSLIC); B-200103, March 5, 1981 (CCC); B-34706, December 5, 1947 (generally). Some decisions also mention other corporate powers like the power to sue and be sued or to conclusively settle claims, but the "character and necessity" power is the crucial element.

The first step in the analysis is to examine a corporation's particular legislation. If Congress has addressed the matter one way or the other, there is no need to go further. Congress is always free to make a particular corporation subject to GAO's account settlement. E.g., B-123943-O.M., July 1, 1955. An example is Federal Prison Industries, whose legislation provides:

[165] The ambivalence of the accounting officers did not start with GAO. For example, in 24 Comp. Dec. 118 (1917), the Comptroller of the Treasury held that the Emergency Fleet Corporation was not required to account to the Treasury for the use of its funds, yet held in later decisions that the corporation had violated laws governing the purchase of typewriters (27 Comp. Dec. 140 (1920)) and prohibiting advance payments (27 Comp. Dec. 311 (1920)).

"Accounts of all receipts and disbursements of the corporation shall be rendered to the General Accounting Office for settlement and adjustment, as required by the Comptroller General." 18 U.S.C. § 4126(d).

See B-98983-O.M., December 18, 1950. The Tennessee Valley Authority (TVA) has an interesting structure. The TVA is expressly made subject to the account settlement laws, but a determination of necessity by the TVA Board of Directors will override a GAO finding to the contrary. 16 U.S.C. § 831h(b). See, e.g., B-209585, January 26, 1983; B-114850-O.M., September 21, 1977.

If a corporation's enabling legislation does not address account settlement, then, for the two reasons noted above, GAO will conclude that the authority does not exist. Most of the cases, including all of the cases cited in the preceding paragraphs, have involved wholly owned corporations. For example, with respect to the Department of Housing and Urban Development when carrying out those functions specified in 31 U.S.C. § 9101(3), see B-182653, January 16, 1975; B-181961/B-182280, November 26, 1974; B-99262-O.M., January 11, 1951. If this is true for wholly owned corporations, it surely must be true for mixed-ownership corporations like the Federal Deposit Insurance Corporation (B-210496, February 1, 1983), and to corporations created and funded by the government but designated as "private," like the Legal Services Corporation (B-241591, March 1, 1991; B-203901, July 9, 1982; B-204886, October 21, 1981).[166]

If the account settlement laws do not apply to a particular corporation, neither do the laws providing for the relief of accountable officers. In such a case, any accountability of officers or employees of the corporation is up to the corporation itself to determine, and would be accountability to the corporation, not the United States. B-88578, August 21, 1951. See also B-83360-O.M.,

[166]Several of the cases cited in this paragraph are bid protest decisions. Prior to the 1984 enactment of the Competition in Contracting Act, account settlement authority was the basis for GAO bid protest jurisdiction.

April 8, 1949 (Certifying Officers' Act not applicable to Federal Crop Insurance Corporation).[167]

b. Status of Funds

If money received by a government agency must be deposited in the Treasury and an appropriation is needed to get it back out, logic would seem to dictate that statutory authority for an agency to retain specified receipts and to spend them for specified purposes amounts to a permanent or continuing appropriation of those receipts. GAO, supported by at least one court of appeals decision, has consistently applied this principle to a variety of revolving funds, user fee accounts, proceeds from sales of goods or services, etc. Further support is found in the Title 31 definition of "appropriations," which is not limited to direct appropriations from the general fund of the Treasury but includes "other authority making amounts available for obligation or expenditure." 31 U.S.C. §§ 701(2)(C), 1101(2)(C). The principle is explored in more detail, with case citations, in Chapter 2 under the heading "What Constitutes an Appropriation."

Viewing the principle in the abstract, that is, setting aside for the moment the question of the consequences of the status determination, there is no reason the principle should not apply to government corporations as well as unincorporated agencies. Thus, GAO has applied the principle in the following situations:

- Tolls assessed and collected by the St. Lawrence Seaway Development Corporation. B-193573, January 8, 1979, as modified by B-193573, December 19, 1979, and restated in B-217578, October 16, 1986. (As noted elsewhere, the Corporation stopped being funded from tolls in the mid-1990s.)
- The Prison Industries Fund operated by Federal Prison Industries, Inc., the receipts of which consist primarily of proceeds from the

[167]GAO did not always feel this way. Earlier decisions purporting to grant or deny relief to certifying officers of the Federal Crop Insurance Corporation, such as B-44435, October 5, 1944 (or for that matter any government corporation with the "character and necessity" authority), have been effectively superseded and should be disregarded to that extent.

sale of FPI products and services. 60 Comp. Gen. 323 (1981); B-230304, March 18, 1988.[168]

- Revolving funds of the Pension Benefit Guaranty Corporation in its capacity as insurer of private pension plans. B-223146, October 7, 1986; B-217281-O.M., March 27, 1985.
- Power program funds (revenue and bonds) of the Tennessee Valley Authority. 64 Comp. Gen. 756, 761-62 (1985).
- Bonneville Power Administration Fund, a revolving fund consisting of all receipts of the Bonneville Power Administration, proceeds from the sale of its bonds, and appropriations Congress may make (16 U.S.C. § 838i). 67 Comp. Gen. 8, 10 (1987).
- Capitalization obtained from the United States Treasury under borrowing authority. B-223857, February 27, 1987 (CCC); B-193573, December 19, 1979 (St. Lawrence Seaway Development Corporation).

It makes no difference whether the statutory language authorizing retention and use is found in an appropriation act or in other legislation. B-193573, December 19, 1979, at 7. The fact that the fund has repaid its initial capitalization to the Treasury and has become self-supporting is also immaterial. 60 Comp. Gen. 323, 326 (1981).

These cases have one important thing in common—they all involve wholly owned government corporations (plus Bonneville, the functional equivalent of one). This should not seem strange because, considering the various types of government-created corporations (wholly owned, mixed-ownership, GSEs, so-called "private," etc.), the wholly owned government corporation is closest to the unincorporated agency.

This being the case, application of the principle to a mixed-ownership government corporation, although possible in theory and perhaps even desirable in some instances, would seem less appropriate. Thus, assessments levied on insured banks by the Federal Deposit Insurance Corporation and used to pay the FDIC's operating expenses are not regarded as "appropriated funds." 23 Comp. Gen. 83 (1943); B-20892, December 11, 1941;

[168]No less a supporter of corporate autonomy than John McDiarmid has referred to the Prison Industries Fund as a "permanent appropriation." See McDiarmid, supra note 45, at 55.

B-214157-O.M., April 2, 1984, at 8-9. See also A-91137, April 11, 1938 (FDIC's assessment-derived funds, while not an appropriation, are the equivalent of an appropriation for purposes of availability for necessary expenses). (None of these cases use the term "mixed-ownership" corporation because they all pre-date the explicit legislative recognition of that term in the Corporation Control Act.)

The Pension Benefit Guaranty Corporation (PBGC) illustrates a situation in which funds in the hands of a wholly owned corporation are not regarded as appropriated funds. The PBGC has two very different functions: it insures certain private pension plans, and it is authorized to serve as trustee for terminated plans. In B-217281-O.M., March 27, 1985, the issue was whether the PBGC had to follow the federal procurement regulations in obtaining investment manager services for (1) excess capital in its revolving funds and (2) assets of terminated plans in its hands as trustee. As noted above, when the PBGC is acting in its capacity as pension plan insurer, its revolving funds are treated as appropriated funds. Accordingly, the procurement regulations applied when procuring services for the revolving funds. However, when serving in its trustee capacity, the PBGC is treated as a private fiduciary and its powers include collecting amounts due the plan, paying plan benefits, liquidating plan assets, and recapturing prior payments. 29 U.S.C. § 1342(d)(1)(B).[169] The funds of terminated plans PBGC administers are trust funds, privately created and privately funded, and are not treated as appropriated funds. Therefore, the PBGC is not bound by the federal procurement regulations when procuring services for its trust funds. Similarly, when using trust funds in its trustee capacity, the PBGC could modify existing contracts and could enter into a contingent-fee arrangement with outside counsel for litigation, without regard to the laws governing the expenditure of appropriated funds. B-223146, October 7, 1986.

In the case of an unincorporated agency, the question whether certain funds are appropriated funds has very significant consequences. If they are, "they are subject to the various restrictions and limitations on the uses of appropriated moneys." 35 Comp. Gen. 615, 618 (1956). In the case of a government

[169]An illustrative case of the Corporation's activities under this authority is Pension Benefit Guaranty Corp. v. Carter & Tillery Enterprises, 133 F.3d 1183 (9th Cir. 1998).

corporation, the result is still to subject the corporation to certain laws governing appropriated funds (or to determine the scope of exemptions for "nonappropriated funds"), but, as discussed next, the range of applicable laws is much narrower and varies depending on the precise terms of a given corporation's governing legislation.

c. Application of Fiscal Laws

As we have seen, fiscal autonomy is one of the key features of government corporations, and, in some cases, the primary impetus for their creation. "Government corporations," GAO conceded long ago, "are conceived not for the purpose of limiting the Government prerogative . . . but of accelerating and enlarging it and of making it more flexible." B-37981, June 1, 1944, at 52. The earliest battles, centering on the effect of corporate status per se, were inconclusive.[170] Changes in the law since that time now provide a framework.

(1) "Character and necessity" provision

GAO has often stated that the funds of "regular," non-corporate agencies, including the various forms of authority to retain and use receipts, are, absent statutory provision to the contrary, "subject to the statutory controls and restrictions applicable to appropriated funds." E.g., 63 Comp. Gen. 285, 287 (1984). In the corporate context, however, this statement is too broad and must be qualified. B-193573, December 19, 1979. The reason, and perhaps the most significant element in the fiscal autonomy of a government corporation, is what we will call the "character and necessity" provision appearing in many, if not most, legislative charters. The provision seems to have originated in the 1930s and there are several variations. An example of the simplest form is 15 U.S.C. § 714b(j), which provides that the Commodity Credit Corporation—

> "[s]hall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid."

A variation is 33 U.S.C. § 984(a)(9), providing that the St. Lawrence Seaway Development Corporation—

[170] "[M]y attention has never been drawn to an act of Congress specifying that the laws of the land do not apply to Government corporations merely because they are Government corporations." B-34706, December 5, 1947, at 4 (Letter from Comptroller General to committee chairman).

"shall determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to Government corporations."

There is no material difference between these versions.

The first thing a "character and necessity" provision does is permit the corporation to avoid the various nonstatutory and "policy rules" the rest of the government follows. The one that comes immediately to mind is entertainment. Of course the congressional approach to providing funds for entertainment is clear statutory recognition of the rule, but there is nevertheless no statute which directly says "Thou shalt not party at the taxpayers' expense." Consequently, a corporation empowered to determine the character and necessity of its expenditures can spend its money on the range of items discussed in Chapter 4 under the "entertainment" heading, subject of course to any applicable statutory restrictions. B-127549, May 18, 1956; B-35062, July 28, 1943. Accordingly, a corporation operating with appropriated funds but without the "character and necessity" provision is subject to the entertainment rules. B-270199, August 6, 1996. (The decision does not mention the lack of "character and necessity" authority, but that was in fact the case and indeed the essential prerequisite to applying the rules.)

A corporation statutorily designated as "private," even though government-created and government-financed, does not need the "character and necessity" language, and may spend money on entertainment unless statutorily restricted. B-131935, July 16, 1975 (Corporation for Public Broadcasting). Congress subsequently amended the Corporation's enabling legislation to prohibit the use of appropriated funds for the entertainment of federal, state, or local officials. 47 U.S.C. § 396(k)(2)(A).

Another category of expenditures legally unobjectionable under "character and necessity" authority are items grouped in Chapter 4 under the heading "Personal Expenses and Furnishings." Examples are:

- Physical examinations for certain employees of the St. Lawrence Seaway Development Corporation. 41 Comp. Gen. 531 (1962).
- Expenses necessary to qualify an employee to do his or her job. B-2835, April 18, 1939 (qualification as notary).

- Payment of travel expenses for chairman's spouse; installing storm windows and door and window locks on chairman's house; paying for his membership in a private tennis club. GAO/FOD-77-14, November 29, 1977 (letter report).

Still another item of expenditure for which funds of a non-corporate agency are unavailable, but which is permissible under a corporation's "character and necessity" power, is hazard insurance on various types of property. 16 Comp. Gen. 453 (1936) (wholly owned corporation); B-200103, March 5, 1981 (CCC, also wholly owned); A-51647/B-15611, January 12, 1942 (unincorporated commission with similar statutory discretion). See also 55 Comp. Gen. 1321 (1976); 11 Comp. Gen. 59 (1931).

This applies as well to creating a reserve for fire, theft, and similar losses. B-123709-O.M., June 29, 1955. Other examples of expenditures found to be within the scope of a "character and necessity" provision are a memorial plaque by the Pennsylvania Avenue Development Corporation (64 Comp. Gen. 124 (1984)); publicity photographs, including 47 pictures of one official (A-57964, January 30, 1935);[171] improvements to nonfederal property (B-11279, August 15, 1940); contracting for personal services to conduct a management survey (33 Comp. Gen. 143 (1953)); contracting for personal services to sell crop insurance on a fee or commission basis (B-48591, March 29, 1945); and the use of air travel credit cards back when GAO was cautioning against them (B-150282, October 21, 1966).

Another major consequence of "character and necessity" authority is to permit the corporation to avoid general statutory restrictions (as opposed to restrictions specifically applicable to government corporations). As GAO put it in B-34706, December 5, 1947, at 3:

> "Where ['character and necessity'] language appears in the act chartering the corporation, there can be no question but that Congress has determined that the

[171]Some of the cases cited in this portion of the text, such as A-57964 and the two personal services cases, involve a statutory variation which confers "character and necessity" authority "without regard to any other provisions of law governing the expenditure of public funds." The effect of the "without regard" language will be addressed later in the text. In the cases cited here, the presence of a "without regard" clause was incidental and the results would have been the same without it.

Congressional or statutory rules otherwise directing how the public monies shall be spent are not of their own force to apply to the corporation, but rather that the corporation shall determine for itself what methods, procedures, etc. should be employed."

One example is 44 U.S.C. § 501, requiring the Government Printing Office to do all printing and binding for the government. (This provision is discussed in more detail under the "Printing and Binding" heading of this part.) Two additional examples, noted in B-193573, December 19, 1979, are 5 U.S.C. § 3107 (prohibiting use of appropriated funds to pay publicity experts) and 31 U.S.C. § 1345[172] (prohibiting use of appropriated funds to pay lodging or feeding of non-government persons at meetings or conventions). See also B-7067, July 10, 1940, and B-3163, April 24, 1939 (now-obsolete portions of predecessor of 5 U.S.C. § 3106 restricting hiring of attorneys).

A formulation GAO has often used is that a wholly owned government corporation with the power to determine the character and necessity of its expenditures is subject to (1) its own charter (enabling legislation); (2) the Government Corporation Control Act, if and to the extent applicable; (3) applicable restrictions contained in annual appropriation acts; and (4) statutes expressly applicable to wholly owned corporations. E.g., B-58305-O.M., April 10, 1951 (Federal Intermediate Credit Banks, subsequently converted to mixed-ownership but listed as wholly owned in the original Corporation Control Act); B-58305-O.M., March 8, 1951 (former Production Credit Corporation); B-58306(2)-O.M., November 14, 1950 (CCC); B-58318-O.M., October 27, 1950 (Export-Import Bank); B-90250-O.M., March 28, 1950 (corporate functions of Federal Housing Administration).[173] Similar statements appear in a number of more recent items. E.g., B-217578, October 16, 1986.

[172]A 1935 decision, 14 Comp. Gen. 638, seemed to say the opposite with respect to this statute, but it apparently overlooked the significance of the "character and necessity" power, although it was mentioned in the request for decision, and for that reason and to that extent should be disregarded.

[173]These are from a series of memoranda issued by the Comptroller General to GAO audit divisions shortly after enactment of the Corporation Control Act, when GAO was refining its ability to conduct corporate audits.

The formula for mixed-ownership government corporations is similar except for the final element. Some earlier mixed-ownership corporations included the "character and necessity" authority or its functional equivalent. E.g., 12 U.S.C. § 1820(a) (FDIC "shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid"). More recent ones tend not to have it. E.g., Pub. L. No. 93-236, title II, 87 Stat. 985, 990 (the now-defunct U.S. Railway Association). For a mixed-ownership corporation, at least one not receiving direct appropriations, it is probably not necessary. Our review of cases involving the FDIC indicates that its autonomy is abetted by the "character and necessity" clause, but that it would most likely have the same degree of autonomy without it, by virtue of its mixed-ownership status and the source of its funding. For example, the FDIC is not required to follow the obligation recording statute, 31 U.S.C. § 1501 (B-121541, December 30, 1954); the statutory restrictions on the purchase of motor vehicles and aircraft, 31 U.S.C. § 1343 (B-94685-O.M., May 8, 1950); or the recurring appropriation act provision restricting the funding of interagency groups (B-174571, January 5, 1972). Attempting to generalize, the first three elements of the formula would be the same as for a wholly owned corporation: a mixed-ownership corporation is subject to its own statutory charter, the Government Corporation Control Act, if and to the extent applicable, and applicable provisions in appropriation acts. In addition, for the fourth element, it is subject to post-charter laws specifically applicable to mixed-ownership corporations. See B-58300-O.M., November 30, 1950 (FDIC).

(2) "Without regard" clause

In addition to the various minor linguistic variations, there is one major variety of the "character and necessity" clause, illustrated by the Federal Crop Insurance Corporation statute quoted above in our discussion of account settlement. It confers the "character and necessity" power, "without regard to the provisions of any other laws governing the expenditure of public funds." Clearly, as a matter of basic statutory construction (or, reading the English language), this version must confer more than the basic "character and necessity" clause that does not include the "without regard" language. Exactly what that "more" is has been the subject of surprisingly little attention, at least in accessible research materials. The question was squarely presented to GAO in 1946 by the (then)

Bureau of the Budget, but GAO declined to answer. B-56550, March 28, 1946. While we have found no definitive discussion of the issue, the rule—subject to exceptions, we are sure—appears to be that the "without regard" language gives the corporation, in addition to everything it gets under the basic "character and necessity" clause, the further ability to avoid laws expressly applicable to government corporations (but not, of course, specifically applicable to the particular corporation), at least laws on the books at the time the "without regard" language was enacted.[174]

For example, in B-94115, November 15, 1950, GAO reviewed the "without regard" clause of the Reconstruction Finance Corporation. Clearly, the clause permitted the RFC to avoid laws existing on May 25, 1948, the date of the clause's enactment, even laws expressly applicable to government corporations. However, GAO added, the broad latitude of the "without regard" clause had been modified by the enactment after 1948 of legislation expressly applicable to government corporations. Id. Several months earlier, the Comptroller General had told GAO's auditors essentially the same thing with respect to the corporate functions of the Federal Housing Administration, B-90250-O.M., March 28, 1950. A good example of how this works is discussed below in connection with apportionment.

A government corporation with a "character and necessity" provision which includes the "without regard" clause has considerable discretion indeed. The discretion is not unlimited, however. It is—

> "a legal discretion to be exercised within the limitations and for the purposes of the statutes providing the funds and prescribing the activities of the [corporation]." 14 Comp. Gen. 698, 700 (1935).

It does not place the corporation "beyond all law or accountability with respect to its expenditures." 14 Comp. Gen. 755, 758 (1935). GAO has not attempted to draw the outer limits of this discretion, other than to suggest a broad "public policy" limitation. The practice

[174]We are aware of the seemingly inconsistent discussion in 65 Comp. Gen. 226 (1986). While that case was correctly decided, some of the discussion appears to misinterpret earlier decisions. The matter is covered in more detail under the "Printing and Binding" heading of this Part.

GAO found illegal in 14 Comp. Gen. 755 was permitting attorneys employed by a government corporation to represent, on a fee basis, private parties in their dealings with the corporation. "The permitting of employees to practice before the public agency by which employed would seem so improper and so out of line with sound public policy as to suggest no need for a prohibiting statute." Id. at 758. Other examples are 14 Comp. Gen. 638 (1935) (use of housing assistance funds to conduct an advertising campaign designed to drum up customers for the program); B-44435, October 5, 1944 (making a payment another party is contractually obligated to make).

Neither is discretion license. It is a conscious, rational choice between two or more alternatives. As such, it must be exercised in accordance with the corporation's established decision-making machinery and procedures. Rubber-stamping an expenditure already made—merely because it was made—"does not constitute the exercise of discretion . . . but a condoning of what has already been done." 14 Comp. Gen. at 700. See also 18 Comp. Gen. 479 (1938); B-56550, March 28, 1946. This does not mean that the machinery must be invoked for each individual transaction. In some cases, the exercise of discretion on a categorical basis is legitimate, as long as done under the established procedures and documented. E.g., A-98289/A-60495, January 18, 1939 (formal board resolution that requirement to have printing done at Government Printing Office is not applicable to the corporation).

(3) Laws expressly applicable

It is clear at this point that it is important to know what laws are expressly applicable to government corporations. GAO prepared a list many years ago which is still useful (B-34706/B-56550-O.M., November 9, 1949), but amendments, recodifications, and inter-title transfers, etc., over the years have in many cases separated the substantive and definitional provisions. Consider, for example, the Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806. After the first 17 sections set out substantive provisions, section 18 provided the following definitions:

> "The word 'department' as used in this Act shall be construed to include wholly owned Government corporations . . . . The word 'appropriation' shall be construed as including funds made available by legislation under . . . the Government Corporation Control Act." 60 Stat. at 811-12.

Thus, any of the first 17 provisions containing the word "department" or the word "appropriation" is expressly applicable to wholly owned government corporations. E.g., 27 Comp. Gen. 757, 758 (1948) (Tennessee Valley Authority may avail itself of authority in section 1 of Administrative Expenses Act, now found in 5 U.S.C. § 5724, to pay travel expenses incident to permanent change of station). The provisions of the Administrative Expenses Act ended up in various locations in the United States Code. Some of the provisions that found their way into Title 5 have retained the appropriate definitional language. E.g., 5 U.S.C. §§ 3109 (employment of experts and consultants) and 7903 (purchase of special clothing or protective equipment). Sometimes it is necessary to look beyond the provision itself. For example, the Government Employees Incentive Awards Act superseded similar authority in section 14 of the Administrative Expenses Act, but did not narrow its scope. The Incentive Awards Act applies to "an Executive agency." 5 U.S.C. § 4501(1)(A). For purposes of Title 5, the term "Executive agency" includes government corporations (5 U.S.C. § 105), which in turn means corporations owned or controlled by the United States (5 U.S.C § 103(1)). The travel expense authority of 5 U.S.C. § 5724 requires a similar analysis. Section 5724(a) refers to "agency." Section 5701 defines agency as including "Executive agency" but not "Government controlled corporation." Applying 5 U.S.C. § 103 again, section 5724 is applicable to wholly owned government corporations.

Some of the provisions of the Administrative Expenses Act are now in Title 31. For example, section 11, 60 Stat. 809, amended the first sentence of the advance payment statute to read, "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." The 1982 recodification of Title 31 was not intended to make substantive changes. Therefore, applying the definitions contained in section 18, the advance payment statute applies to wholly owned corporations. GAO applied the identical reasoning to conclude that statutory restrictions on home-to-work transportation, 31 U.S.C. § 1344 (whose source is section 16 of the Administrative Expenses Act) apply expressly to government corporations. B-210555.11, April 1, 1986. The home-to-work statute was completely overhauled later in 1986. The revised statute expressly applies to government corporations as defined in 5 U.S.C. 103 plus mixed-ownership corporations. 31 U.S.C. §§ 1344(g)(2)(D), (E), (F).

Still another provision of the Administrative Expenses Act, section 9, 60 Stat. 809, amended the statutory requirement for advertising now found in 41 U.S.C. § 5. Since it uses the word "appropriation," it applies to wholly owned corporations by virtue of section 18, which itself is now found at 41 U.S.C. § 5a.

A similar situation occurs in the case of 31 U.S.C. § 1512, the apportionment requirement. The apportionment provisions were substantially overhauled in 1950. The revision included language making these provisions applicable to "any corporation wholly or partly owned by the United States which is an instrumentality of the United States" (64 Stat. 766). The 1982 recodification of Title 31 dropped this definitional language. The former Federal Savings and Loan Insurance Corporation, chartered in the 1930s, argued that its nonadministrative funds should not be subject to apportionment because it was empowered to determine the character and necessity of its expenditures without regard to any other provision of law governing the expenditure of public funds. Upon a detailed analysis, the Justice Department's Office of Legal Counsel concluded that the "specifically crafted, later-enacted" apportionment law applied to all of the corporation's funds, administrative and nonadministrative. 7 Op. Off. Legal Counsel 22, 26 (1983). GAO had reached the same conclusion in 43 Comp. Gen. 759 (1964). (Apparently, the FSLIC never tried to argue in either case that its "without regard" power should affect the applicability of the later-enacted apportionment provisions to its administrative funds.) A statutory exception is 12 U.S.C. § 1817(d) (funds of FDIC, however derived, not subject to apportionment).

(4) <u>Appropriation act provisions</u>

Another source of expressly applicable laws is appropriation acts. Worthy of note is section 609 of the Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1310:

> "Funds made available by this or any other Act for administrative expenses in the current fiscal year of the corporations and agencies subject to [the Corporation Control Act] shall be available, in addition to objects for which such funds are otherwise available, for rent in the District of Columbia; services in accordance with 5 U.S.C. 3109; and <u>the objects specified under this head, all the provisions of which shall be applicable to the expenditure of such funds unless otherwise specified</u> in the Act by which they are made available: <u>Provided</u>, That in the event

any functions budgeted as administrative expenses are subsequently transferred to or paid from other funds, the limitations on administrative expenses shall be correspondingly reduced." (Emphasis added.)

The ancestor of this provision first appeared in the very first Government Corporation Appropriation Act (Act of July 20, 1946, ch. 589, § 301, 60 Stat. 586, 595), enacted a short six months after the Corporation Control Act. Since 1972, it has been carried in the Treasury-General Government appropriation acts in the title containing the government-wide general provisions, so "this head" refers to that title (e.g., Title VI in the 1998 act). Therefore, there may be other laws expressly applicable to government corporations, by virtue of the underscored language, in the pertinent title each year. Although this provision has been around since 1946, GAO does not appear to have addressed the underscored language in writing.

There is no government-wide definition of "administrative expenses." Generally, the term refers to "overhead" type expenses like salaries, office supplies and equipment, payroll taxes, and telephone and other utility expenses. Leonard v. S.G. Frantz Co., 49 N.Y.S.2d 329, 332-33 (N.Y. App. Div. 1944). In contrast, nonadministrative or program expenses are things like loan guarantee or subsidy payments. GAO has suggested that a fixed definition in other than the most general terms would probably be impossible because the status of a given expense depends on the particular program, the governing legislation, and congressional intent, and what may be an "administrative expense" under one program or law may not be under another. B-24341, March 12, 1942, at 5. As the last sentence of the general provision quoted above demonstrates, a corporation has considerable discretion in allocating items of expense. Program statutes or regulations may include their own definitions, which of course would control. E.g., 12 U.S.C. § 1702 (National Housing Act). Congress may also address the issue in appropriation acts by providing that specific items of expense shall or shall not be considered administrative expenses for purposes of a statutory limit. E.g., Pub. L. No. 105-78, 111 Stat. 1467, 1472 (1997) (Pension Benefit Guaranty Corporation); Pub. L. No. 105-118, 111 Stat. 2386, 2387 (1997) (Export-Import Bank).

Another form of language Congress has used is a restriction applicable to "any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency." This language has been held to embrace both wholly owned corporations (B-114823, December 23, 1974, Export-Import Bank) and mixed-ownership corporations (B-164497(5), March 10, 1977, U.S. Railway Association).

(5) Other Title 31 provisions

The post-recodification Title 31 defines "agency" to mean "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. The codification note following 31 U.S.C. § 1511 makes it clear that "instrumentality" is intended to include those government corporations which are instrumentalities of the United States. This applies to all of Title 31 unless another more specific provision intervenes, which it does on several occasions. For example, GAO's authority to prescribe accounting principles and standards (31 U.S.C. § 3511) does not apply to government corporations. B-207435, July 7, 1982. This is because, for purposes of the chapter in which section 3511 appears, the definition of "executive agency" specifically excludes corporations or other entities subject to the Government Corporation Control Act. 31 U.S.C. § 3501. Similarly, 31 U.S.C. §§ 717 (program evaluations) and 720 (agency reports on GAO recommendations) include their own definitions under which they apply to wholly owned, but not mixed-ownership, government corporations.

The Antideficiency Act's prohibition against overobligation and overspending, 31 U.S.C. § 1341, has been applied to wholly owned corporations with "character and necessity" authority. B-223857, February 27, 1987 (CCC); B-135075-O.M., February 14, 1975 (Inter-American Foundation). In B-223857, GAO found also that the CCC violated the voluntary services prohibition, 31 U.S.C. § 1342, by directing contractors to continue performance after its borrowing authority had been depleted. A government-created corporation statutorily designated as private or not an agency or instrumentality of the United States is not subject to the Antideficiency Act. B-175155, July 26, 1976, at 11 (Amtrak).

The statute which prescribes the standards for recording obligations, 31 U.S.C. § 1501, also applies to government corporations which are agencies or instrumentalities of the United States. E.g., B-123943-O.M., July 1, 1955 (Institute of Inter-American Affairs); 34 Comp. Gen. 825 (1954) (GAO's initial guidance on implementing the then-new recording statute). See also United

States v. American Renaissance Lines, 494 F.2d 1059 (D.C. Cir. 1974) (CCC), and 37 Comp. Gen. 691 (1958) (St. Lawrence Seaway Development Corporation), in which the court and GAO, respectively, treated the statute as applicable without directly addressing the issue. The original enactment of 31 U.S.C. § 1501 was section 1311 of the Supplemental Appropriations Act for 1955 (68 Stat. 830); section 1306 is the "this head" provision for that year.

The Economy Act, 31 U.S.C. § 1535, applies at least to wholly owned government corporations. The corporation can be the requisitioning agency (13 Comp. Gen. 138 (1933); B-27842, August 13, 1942), or the performing agency (B-116194, October 5, 1953; B-39199, January 19, 1944; A-46332, January 9, 1933). If a corporation has specific charter authority to provide goods or services to other government establishments, the specific authority will displace the Economy Act. E.g., 44 Comp. Gen. 683 (1965) (sale of electric power by Tennessee Valley Authority to other government agencies).

The so-called "Stale Check Act," Act of July 11, 1947, ch. 222, 61 Stat. 308, now codified in 31 U.S.C. § 3328, has been held applicable to a government corporation with "character and necessity" power including the "without regard" clause. B-70248, September 1, 1950. Naturally, it would apply to corporations without that authority. B-70248, November 6, 1947; B-100893-O.M., March 27, 1951. This act prescribes requirements for handling Treasury checks. The original language applied expressly to checks "drawn by wholly owned and mixed-ownership Government corporations," except for "transactions regarding the administration of banking and currency laws." 61 Stat. 308. The 1982 recodification dropped the definitional language. Nevertheless, in view of the original language, the statute should still apply to government corporations.

The 1950 decision cited in the previous paragraph involved the Reconstruction Finance Corporation, which received its "without regard" authority in 1948, a year after enactment of the Stale Check Act. At first glance, therefore, this would appear to contradict our earlier discussion that a "without regard" clause permits the corporation to avoid expressly applicable laws already in existence. The answer is that it depends on what kind of law you're talking about. The decision stated:

"[W]here the Corporation has decided a payment should be made, and issued a check drawn on the Treasurer of the United States, it appears that the discretion of the Corporation has then been exercised. . . . The obligation after issuance of the checks . . . appears clearly to be a Treasury obligation, not one of the Reconstruction Finance Corporation." B-70248, September 1, 1950, at 5.

Another provision with relevance to government corporations is 31 U.S.C. § 3301(a)(1), which directs the Secretary of the Treasury to "receive and keep public money." This provision, as reinforced by the Government Corporation Control Act (31 U.S.C. §§ 9107(b) and (c)), applies to the appropriated funds of a government corporation unless waived pursuant to the latter authority. Thus, a government corporation is not entitled, solely by virtue of its corporate status, to have its appropriation paid over directly to it "up front" in a lump sum. Rather, like any other agency, the money stays in the Treasury until needed for a valid purpose. 21 Comp. Gen. 489 (1941). Congress can, of course, provide differently. An example is the Corporation for Public Broadcasting, whose appropriations "shall be disbursed by the Secretary of the Treasury on a fiscal year basis." 47 U.S.C. § 396(k)(2)(B).

A final provision we will note is 31 U.S.C. § 3302(b), the miscellaneous receipts statute. If "character and necessity" authority is one major leg upon which the fiscal autonomy of a government corporation rests, the use of revolving fund-type financing is the second. If a government corporation is realistically expected to perform business-type functions with any efficiency, the requirement to deposit all receipts in the Treasury and await congressional appropriations can be a serious impediment. True as that may be, even a government corporation needs statutory authority to overcome 31 U.S.C. § 3302(b); corporate status alone is not enough. 52 Comp. Gen. 54, 55 (1972); 5 Comp. Gen. 1004 (1926). For most corporations, the solution is the charter authority to retain and reuse receipts, the exact type of receipts varying with the particular corporation. These are called "public enterprise revolving funds" and effectively displace 31 U.S.C. § 3302(b).[175] Revolving funds are covered in Chapter 15 and we will not repeat that discussion here, except to emphasize that the legislation creating the fund determines what can go into it and what it can be used for.

[175]For the distinctions between government corporation revolving funds and those of unincorporated agencies, see Moe 1995, supra note 41, at 62.

For example, the statute for the Overseas Private Investment Corporation, 22 U.S.C. § 2196, uses very broad language—"all revenues and income . . . from whatever source derived." See 52 Comp. Gen. 54 (1972) (interest earned by OPIC on foreign currencies held in designated depositaries pending their sale for dollars may be retained and used).

Along similar lines, a provision in a 1945 appropriation act limited expenditures for long-distance telephone calls to 90% of the agency's budget estimate for that purpose. The resulting savings were to be deposited as miscellaneous receipts. GAO interpreted the provision as contemplating "the return of such funds to the source from which made available," and advised the CCC that it could retain its savings and did not have to deposit them in the general fund of the Treasury. 24 Comp. Gen. 514, 517 (1945).

d. Program Implementation

Thus far, our discussion of fiscal autonomy has focused on the ability of a government corporation to avoid laws applicable to the rest of the government. There is another dimension, however. The discretion of a government corporation also helps determine the scope of the corporation's program activities, wholly apart from questions of compliance with specific laws.

It would seem hardly open to question that the very common-sense statute, 31 U.S.C. § 1301(a), which prohibits the use of appropriations for other than their intended purposes, applies to the "appropriated funds"—as we have described that term earlier—of a government corporation. E.g., 30 Op. Att'y Gen. 508 (1915). In that case, the Attorney General advised the Panama Railroad that setting rates below the cost of service would amount to giving away corporate assets and improperly diverting the company's funds, "irrespective of whether we observe or disregard the corporate fiction." Id. at 509.

The analytical approach to purpose availability is essentially the same for a corporation as for other agencies. The expenditure must bear a logical relationship to furthering some authorized function or activity, and must not be otherwise prohibited or otherwise expressly provided for. For example, it is within the discretion of Federal Prison Industries, Inc., (FPI) to engage in the business of manufacturing envelopes for sale to the rest of the government. B-240914, August 14, 1991. While FPI is generally supposed to seek out more labor-intensive activities, this is not an absolute legal requirement, and the corporation could properly determine that envelope manufacturing would further its objectives. Similarly, the Saint Lawrence Seaway Development Corporation could use its funds for minor work on the Canadian side of the border if closely related and ancillary to its primary work on the United States side. 34 Comp. Gen. 309 (1954).

While the corporations cited in the preceding paragraph are wholly owned, the principle applies equally to the "appropriated funds" of a mixed-ownership corporation. For example, the National Credit Union Administration could not avoid restrictions on paying relocation expenses to one of its officials by transferring the charge to the accounts of the Central Liquidity Facility (CLF) where the official was clearly an employee of, and whose salary was paid entirely by, the Administration and not the CLF. 63 Comp. Gen. 31, 36-37 (1983).

When you add "character and necessity" authority to the discretion already inherent under 31 U.S.C. § 1301(a), the result is that a government corporation has much more spending discretion than other agencies. In addition, it has the power to make its own final and conclusive decisions. But it is still subject to the overall limitation that its discretion be exercised "within the limitations and for the purposes of the statutes providing [its] funds and prescribing [its] activities." 14 Comp. Gen. 698, 700 (1935). In this sense, the concept of purpose—using the standards of corporate autonomy and not those of non-corporate agencies—along with the "public policy" concerns noted earlier, may be said to define the outer limits of a corporation's discretion.

An illustration of how all this can work is B-48184, March 14, 1945. The Federal Housing Administration had acquired title to a rental housing development under its mortgage insurance program. The FHA could retain and operate the development or could, within its discretion, sell it. A major drawback was that, except for a "low grade combination grocery store and beer parlor," there were no shopping facilities in the development or nearby area. After unsuccessfully trying to interest private capital, the FHA proposed to use its own funds to provide a "shopping center" consisting of a food store, drug store, barber shop, beauty shop, shoe repair shop, laundry, gasoline station, and a management office. The shopping center, said FHA, would help significantly to make the development livable during the period of FHA operation, and would enhance its value if and when the FHA decided to sell it. The FHA had statutory authority to "deal with, complete, rent, renovate, modernize . . . or sell" the property, and to determine the necessity of its expenditures. In light of this authority and the FHA's justification, GAO concurred with the proposal, notwithstanding the lack of statutory authority for new construction.

A sampling of cases involving three additional entities—the Commodity Credit Corporation, the Bonneville Power Administration, and Amtrak—further illustrates the role of corporate discretion, and its limitations, in program implementation.

(1) Commodity Credit Corporation

Created in 1933, the Commodity Credit Corporation (CCC) operates a variety of price support programs for agricultural commodities (including such things as direct subsidy payments and loans) and export programs designed to develop foreign markets for American agricultural products. It is a wholly owned government corporation and "an agency and instrumentality of the United States, within the Department of Agriculture." 15 U.S.C. § 714. It is unusual in that it has no employees. It is managed by a presidentially-appointed board of directors (15 U.S.C. § 714g), but its day-to-day operations are carried out by Department of Agriculture employees who, in effect, wear two hats. It has the authority to determine the character and necessity of its expenditures. 15 U.S.C. § 714b(j).

In a 1982 case, the Justice Department's Office of Legal Counsel reviewed two programs CCC had created to promote agricultural exports by guaranteeing exporters or their financing institutions against certain risks. There was no explicit statutory authority for the programs, but CCC is authorized to "use its general powers" to "aid in the development of foreign markets for agricultural commodities." 15 U.S.C. § 714c(f). One of those general powers is the "character and necessity" power. Since the programs were unquestionably designed to promote exports, they had adequate statutory authority. 6 Op. Off. Legal Counsel 233 (1982). The following year, GAO reviewed payments made under these programs to United States banks which had financed exports to the (then) Polish People's Republic. While the CCC had not strictly complied with its own regulations, the deviations were essentially on matters of procedure, which the CCC could waive. Therefore, GAO found nothing objectionable. B-208610, September 1, 1983.

In B-213761, July 27, 1984, GAO considered aspects of the CCC's tobacco price support program. Specifically, there were differences between the procedures Treasury used in charging interest and crediting repayments against loans to the CCC and the procedures the CCC used in charging interest and crediting repayments on loans it made to tobacco producers. The impact was to increase the amount of the CCC's "net losses," for which appropriations are made annually. While GAO felt that the CCC should change its procedures to more closely align with Treasury's procedures, and had made this recommendation on more than one occasion, the CCC was under no legal requirement to do so. The terms and conditions of its loans were within its discretion.

Much of the detail in CCC's programs comes from its regulations. The extent to which it may deviate with impunity from the terms of its regulations suggests another test of the range of the corporation's discretion. A 1965 case involved price support payments to tobacco producers under regulations which made the payments available only for sales within the annual normal marketing season. A temporary funding shortage forced suspension of payments. The question was whether, once the funds became available, the CCC could make payments to producers for sales occurring shortly after the normal marketing season. If legal liability to those producers could be established, the answer of course would be yes. GAO did not think it could, but found the matter sufficiently doubtful, especially in light of prior practice, and therefore advised the CCC that the payments would be unobjectionable. 44 Comp. Gen. 735 (1965). As noted above, the CCC, like any other government agency, can deviate from procedural regulations, at least as long as the action does not prejudice other parties. Its discretion does not extend, however, to retroactively waiving substantive regulations without statutory authority. 53 Comp. Gen. 364 (1973); B-208610, September 1, 1983.

Cases involving the price support program for milk and milk products illustrate a situation in which corporate discretion must be subordinated to the terms of the program statute. The pertinent statute, an earlier version of 7 U.S.C. § 1446(c), provided that price support "shall be provided through loans on, or purchases of, milk and the products of milk and butterfat." Some within Agriculture wanted to make direct price support payments, relying on CCC's broad general powers. The Department's Solicitor said, effectively,"No, you can do only what the statute says." The matter then went to the Attorney General, who also said, "no." 41 Op. Att'y Gen. 183 (1954). The CCC's general powers "cannot reasonably be deemed to enlarge the specific powers granted in [the price support statute]." Id. at 186. Agriculture then proposed to purchase the products at one price, and then sell them back to the same parties at a lower price. The products themselves would never move. GAO got into the act this time, holding that this was not a bona fide purchase and that the payments were, therefore, unauthorized. B-124910, August 15, 1955. Justice then proceeded to initiate recovery of the amounts improperly paid, and at least three courts of appeals agreed that the payments were illegal and could be recovered.[176] See also B-211462-O.M., October 31, 1983 (statutory payment limitation applies to in-kind payments as well as cash, CCC's broad discretion notwithstanding).

In 1961, CCC made another proposal, strikingly similar on the surface. The CCC would accept grain in satisfaction of loans it had made to the producer, and then sell the grain—which never moved—back to the same producer at current support rates. This case was different, however. The resale back to the producer was under an emergency assistance program, separate and distinct from the program under which the loans had been made. There was no lack of genuineness to the transaction, and selling back to the same producer made sense because it would save money for all concerned by eliminating moving and handling charges. Accordingly, GAO found this proposal to be within the CCC's authority and discretion. 40 Comp. Gen. 571 (1961).

An illustration of an expenditure expressly otherwise provided for is B-142011, June 19, 1969, very similar in principle to 63 Comp. Gen. 31, the Central Liquidity Facility decision summarized earlier.

[176]Kraft Foods Co. v. Commodity Credit Corporation, 266 F.2d 254 (7th Cir. 1959); Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation, 265 F.2d 163 (8th Cir. 1959); Swift & Co. v. United States, 257 F.2d 787 (4th Cir. 1958).

Some had suggested that the Agriculture Department could avoid a limitation in its salaries and expenses appropriation by having certain salaries paid from CCC funds. Agriculture felt this would be improper. GAO agreed:

"We see no significant distinction between using an otherwise available general appropriation for a particular object, when there is a specific appropriation for such object, and using corporate funds for a purpose for which a specific appropriation has been made, in order to avoid a limitation pertaining to the specific appropriation." B-142011, at 12.

A case in which the expenditure bore no relationship to a legitimate corporate purpose is B-129650, May 11, 1977. A practice had developed of using the CCC revolving fund to purchase foreign currencies to be used for congressional travel expenses, beyond the limited authority then found in 22 U.S.C. § 1754(b). Finding no authority for this practice, the decision stated, at page 3:

"While included among the general powers of the CCC is the authority to determine the character and necessity of its expenditures . . . the broad administrative discretion thereby conferred must be exercised in conformity with the congressional purpose of the CCC . . . and in accordance with the specific powers granted to the CCC [by statute]. . . . Nothing in these provisions . . . suggest[s] a congressional intent to allow conversions of dollar funds to foreign currencies for use for congressional travel."[177]

(2) Bonneville Power Administration

The Bonneville Power Administration is one of the Department of Energy's regional power marketing administrations. Created in 1937, it markets and transmits electric power in the Pacific Northwest. It is not a government corporation but "an office in the Department of Energy . . . under the jurisdiction and control of the Secretary of Energy." 16 U.S.C. § 832a(a). Nevertheless, its statutory powers are comparable to those of a wholly owned government corporation. It is financed through a revolving fund, 16 U.S.C. § 838i, and has the following general powers:

"Subject only to the provisions of this chapter, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the

[177]The statute was subsequently amended to give Treasury a permanent indefinite appropriation to purchase the necessary currencies. See B-129650, March 27, 1979.

amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.

"The administrator may make such expenditures for offices, vehicles, furnishings, equipment, supplies, and books; for attendance at meetings; and for such other facilities and services as he may find necessary for the proper administration of this chapter." 16 U.S.C. §§ 832a(f), 832h(b) (respectively).

Although not a corporation, Bonneville is subject to the Government Corporation Control Act provisions for wholly owned corporations. 16 U.S.C. § 838i(c). Thus, Bonneville has essentially the same range of spending discretion as a wholly owned corporation. It is also subject to the same overall purpose limitation which is, in addition to 31 U.S.C. § 1301(a), spelled out in 16 U.S.C. § 838i(c) ("Moneys heretofore or hereafter appropriated shall be used only for the purposes for which appropriated").

Before the enactment of 16 U.S.C. § 832a(f), Bonneville's spending discretion was not materially different from that of other government agencies. E.g., B-46169, May 5, 1945 (appropriations unavailable for entertainment). However, the enactment of that provision in October 1945 made a material change:

"The legislative history of [16 U.S.C. § 832a(f)] indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities." B-105397, September 21, 1951, at 3.

Naturally, anything Bonneville could do before the amendment was unaffected. An example would be 20 Comp. Gen. 566 (1941) (Bonneville's appropriations available for photographic identification cards for its employees). Other examples, validated under 16 U.S.C. § 832h(b), which predated § 832a(f), are 18 Comp. Gen. 843 (1939) (purchase of motion picture equipment to record key aspects of construction program), and B-25800, May 20, 1942 (expenses of attendance at meetings).

The latitude given Bonneville has enabled it to structure its dealings to reflect the nature of the business in which it is involved, the characteristics of the geographical region in which it operates, and changing circumstances. In a 1962 case, for example, Bonneville proposed an agreement with the ill-fated Washington Public Power Supply System (WPPSS) under which WPPSS would furnish to Bonneville electric power purchased from the Atomic Energy Commission's Hanford reactor, and Bonneville would provide "firm power" (i.e., not subject to interruptions) in exchange. The agreement would terminate if the reactor was discontinued prior to commencement of commercial operations, in which event Bonneville would reimburse WPPSS for certain expenses incurred up to that point. As long as the Atomic Energy Commission's participation received congressional approval, GAO found no problem with Bonneville's authority to enter into the agreement. B-149016, B-149083, July 16, 1962.

In 46 Comp. Gen. 349 (1966), Bonneville was acquiring 500-kv. circuit breakers, and decided to spread the risk among several manufacturers to minimize risk of major power failure until the circuit breakers had been in service for sufficient time to assure that they were free from defects. Bonneville's discretion permitted it to do this, and to exclude from the solicitation two firms from which it had already purchased circuit breakers.

Bonneville is required to give "preference and priority to public bodies and cooperatives." 16 U.S.C. § 832c(a). It is also authorized to sell electric power "either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons," as well as to other federal agencies. 16 U.S.C. § 832d(a). While Bonneville is thus authorized to sell directly to private consumers, it is not legally required to do so, and is therefore under no obligation to sell power to every applicant. B-158903, July 6, 1966.

A concept frequently arising in the Bonneville cases is the concept of "net billing." This is, in oversimplified terms, a system under which Bonneville, in billing its customers, liquidates certain of its payment obligations by reducing the bill by the amount the customer has paid either to Bonneville under some separate arrangement or to some other party under a variety of complex arrangements. GAO approved the concept as within Bonneville's authority in B-170878, October 21, 1970. (Actually, this was a pretty easy decision since Congress had already recognized the concept in legislation.) A few years later, it became apparent that, in the particular situation addressed in B-170878, net billing would be inadequate to sustain the purchase of sufficient power. Bonneville then proposed to purchase power for its preference customers under what it called a "trust-agency" agreement. While finding this authorized as well, GAO stressed the purpose limitation on Bonneville's discretion:

"While 16 U.S.C. § 832a(f) is intended to confer broad administrative discretion on the Administrator, that discretion must always be exercised in furtherance of the purposes, and subject to the provisions, of the [program legislation]." B-137458, September 13, 1974, at 5.

The financing mechanism of net billing agreements has been judicially approved, as well. In City of Springfield v. Washington Public Power Supply System, 564 F. Supp. 90, 95 (D. Ore. 1983), the court described one system as follows:

"The net billing agreements are contracts between the United States, acting through BPA, WPPSS, and the Northwest utilities. Under these contracts, utilities buy power from BPA. Instead of paying BPA, however, utilities pay WPPSS, which uses the money to retire bonds . . . . Thus BPA "net-bills" for power and those bills are paid to WPPSS as third party beneficiary of the BPA-utility contracts and in satisfaction of WPPSS' rights under the net billing agreements."

The Ninth Circuit Court of Appeals modified the district court's decision in certain respects, but affirmed its holding that these were essentially contracts for the purchase of electricity and thus within Bonneville's authority. City of Springfield v. Washington Public Power Supply System, 752 F.2d 1423 (9th Cir. 1985). One factor both courts noted was that Bonneville had assumed "dry-hole risk." That is, Bonneville would pay even if the generating plants were never completed or never produced saleable power, thus insulating public bodies from having to resort to future taxation. 564 F. Supp. at 93, 95; 752 F.2d at 1429.

The extent to which Bonneville's range of discretion permits it to tailor arrangements to fit specific program needs is illustrated in B-210929, August 2, 1983. As construction of one of the WPPSS plants approached completion, WPPSS found itself unable to obtain further bond financing. Bonneville proposed, and GAO concurred, to pay, by direct disbursement or net billing, to complete construction of the WPPSS project. The argument against direct payment was that Bonneville had not presented this as an option when seeking congressional approval. However, GAO found that direct payment would not be inconsistent with congressional approval of the net billing approach since direct payment funds would be derived at least ultimately from rate adjustments, and the end result—costs borne by Bonneville's ratepayers rather than taxpayers—would be the same. It would amount simply to "[doing] directly what Congress otherwise authorized it to do indirectly." Id. at 16.

Still another area in which Bonneville's discretion has been upheld is the Pacific Northwest-Pacific Southwest Intertie, a system of high-voltage transmission lines partially owned by Bonneville and designed to permit the regions to help each other during times of heavy demand. Bonneville is required to first give itself preference and then to make excess capacity available to others. 16 U.S.C. § 837e. The courts have upheld Bonneville's policies for the allocation of excess Intertie capacity as within its discretion, assuming that allocation is done in a fair and nondiscriminatory manner (16 U.S.C. § 838d). Department of Water and Power of Los Angeles v. Bonneville Power Administration, 759 F.2d 684 (9th Cir. 1985); California Energy Resources Conservation and Development Commission v. Bonneville Power Administration, 831 F.2d 1467 (9th Cir. 1987).

Finally, Bonneville has the discretionary authority to engage in certain energy conservation programs. B-114858, July 10, 1979; 3 Op. Off. Legal Counsel 419 (1979). The question was whether energy conservation is consistent with Bonneville's statutory mandate to encourage widespread use of federally generated power. In other words, is its main job to push the stuff, or save it? Bonneville's argument, successful as it turned out, was that it viewed conservation as an investment in increased production rather than a demand reduction device. Once again, the GAO opinion stressed that Bonneville's discretion, broad though it may be, "must always be exercised in furtherance of the purposes, and subject to the provisions, of BPA's enabling legislation." B-114858, at 4.

(3) Amtrak

Amtrak was created by the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, title III, 84 Stat. 1327, 1330.[178] Its purpose is to provide modern and efficient intercity and commuter rail passenger transportation. 49 U.S.C. § 24101(b). Although federally created and receiving substantial federal financial assistance, Amtrak is to be "operated and managed as a for-profit corporation," and is "not a department, agency, or instrumentality of the United States Government and shall not be subject to title 31." 49 U.S.C. §§ 24301(a)(2) and (3), as amended by Pub. L. No. 105-134, § 415(d), 111 Stat. 2570, 2590 (1997).[179] It was originally designated a mixed-ownership government corporation,[180] but this was dropped in 1997.[181] It is also classed as a railroad carrier for purposes of certain portions of the Interstate Commerce Act (49 U.S.C. § 24301(a)(1)), and is thus subject to the jurisdiction of the Surface Transportation Board, successor to the Interstate Commerce Commission, to that limited extent.[182] GAO is authorized to conduct "performance audits of [Amtrak's] activities and transactions." 49 U.S.C. § 24315(e); B-175155, October 21, 1981 (internal memorandum).

The congressional objective is eventual profitability and elimination or at least minimization of federal subsidies. See 49 U.S.C. § 24101(d), as amended by Pub. L. No. 105-134, § 201, 111 Stat. at 2578, mandating that Amtrak operate without federal operating grants by fiscal year 2004. Nevertheless, federal financial assistance has always been necessary. This takes the form of appropriations made to the Secretary of Transportation for the purpose of making

[178]Much of Amtrak's legislation was transferred from Title 45 of the U.S. Code to Title 49 as part of a 1994 recodification. While 45 U.S.C. § 1104(1) still defines Amtrak as the National Railroad Passenger Corporation, the recodified provisions in Title 49 have dropped the formal designation and use only "Amtrak." See the codifier's note to 49 U.S.C. § 24101.

[179]The version in effect immediately prior to the 1994 recodification said that Amtrak was not "an agency, instrumentality, authority, or entity, or establishment" of the United States. 45 U.S.C. § 541 (1988 ed.).

[180]Pub. L. No. 91-518, § 804, 84 Stat. at 1340.

[181]Pub. L. No. 105-134, § 415(d)(2), 111 Stat. at 2590.

[182]Subsection 24301(a)(1) was amended by Pub. L. No. 105-134, § 401, 111 Stat. at 2585, to clarify Amtrak's relationship to the Interstate Commerce Act. See H.R. Rep. No. 105-251, at 36 (1997).

"grants" to Amtrak. E.g., Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1435 (1998). Amtrak makes its funding requests to the Secretary of Transportation, who in turn includes them as part of Transportation's portion of the President's budget. B-175155(2), September 26, 1978 (requirement in 31 U.S.C. § 1105(a)(5) for five-year projection not applicable to Amtrak's funding requests to Secretary). As with the 1998 appropriation, the funds are made available until expended, and may include separate amounts for operating losses and capital improvements. Amtrak receives half of the appropriation on October 1, and the balance at not less than 90-day intervals unless it can justify more frequent payment. 49 U.S.C. § 24104(d).

The statutory payout schedule "has virtually assured" that Amtrak will receive more money than it immediately needs for current expenses. B-175155(2), April 22, 1975, at 4. Congress did not restrict the use of these funds but "expects Amtrak to utilize them in accordance with its best business judgment." Id. Thus, a line of Comptroller General decisions held that Amtrak could use its "grant funds" for such things as advances on capital equipment (B-175155(2), April 22, 1975); investment to the extent funds are not currently needed (B-175155, June 11, 1975); payment of operating expenses while funds from other sources are temporarily invested (Id.); retirement of long-term debt obligations under a since-repealed provision for the Secretary of Transportation to guarantee loans to Amtrak (B-175155(2), July 26, 1976); and installing fire fighting equipment in railroad tunnels in New York City to comply with a safety order of the New York City Fire Department (B-175155, May 22, 1978). When investing "excess" funds, Amtrak may retain the interest earned, notwithstanding their designation as "grant funds." B-175155, June 11, 1975.

In surveying decisions and opinions relating to Amtrak, the details are of secondary importance because virtually every provision of Amtrak's legislation has changed, sometimes repeatedly. These cases are intended to illustrate the operational and spending freedom of a "non-instrumentality" corporation, in principle. The Supreme Court has said that Amtrak's non-instrumentality disclaimer "is assuredly dispositive of Amtrak's status . . . for purposes of matters that are within Congress' control." Lebron v. National R.R. Pass'r Corp., 513 U.S. 374, 392 (1995). Thus, the answer to the typical question of whether this or that law applicable to government entities applies to Amtrak is, "no." E.g., Sentner v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982) (Amtrak does not share the government's immunity from awards of punitive damages). See also B-206638, April 1, 1982 (internal memorandum) (Federal Acquisition Regulations, mandatory provisions of Federal Supply Schedule).

Of course, since we are talking about "matters within Congress' control," Congress does have a certain freedom in defining the applicability of laws. For example, we noted earlier that Amtrak is not subject to the Antideficiency Act. B-175155, July 26, 1976. Yet, Amtrak's 1998 appropriation includes a proviso that "the incurrence of any obligation or commitment by the Corporation for the purchase of capital improvements with funds appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. 1341." Pub. L. No. 105-66, 111 Stat. at 1435. The point is that making the Antideficiency Act applicable, even to this limited extent, required legislation specifically applicable to Amtrak.

Another group of GAO cases deals with compensation issues. The 1970 legislation creating Amtrak placed no limit on the compensation of the corporation's officers. A 1972 amendment limited compensation to level 1 of the Executive Schedule.[183] A question arose as to whether the value of fringe benefits had to be counted in applying the ceiling. Amtrak wanted to provide fringe benefits normal in the rail industry. These included group life insurance, travel accident insurance, long-term disability benefits, hospital surgical and major medical coverage, non-contributory retirement benefits, and free transportation for employees and their dependents on Amtrak trains. Noting that the ceiling was the same as that for cabinet members, who receive fringe benefits in addition to their statutory compensation, and finding nothing to indicate a contrary intent for Amtrak officers, GAO concluded that the fringe benefits need not be considered "compensation" for purposes of the ceiling. B-175155, January 7, 1974. The limitation was changed in 1988[184] to prohibit rates of compensation greater than "the general level of pay for officers of rail carriers with comparable

[183]Pub. L. No. 92-316, § 1(a), 86 Stat. 227 (1972).

[184]Pub. L. No. 100-342, § 18(c), 102 Stat. 624, 636 (1988).

responsibility." 49 U.S.C. § 24303(b). While the ceiling is now more amorphous than the fixed-dollar ceiling of 1974, the principle of B-175155 should remain valid, unless practices in the private rail industry change so as to include fringe benefits as part of "compensation."

Amtrak was also offering its officers "separation agreements," under which they would receive an additional payment of up to a year's salary upon termination of their services. If somehow the payments could be regarded as payments for post-termination services, they would be permissible. If, however, they were nothing more than a form of deferred compensation to avoid the statutory limitation, they would violate the statute. B-175155, May 1, 1974; B-175155, January 7, 1974. Amtrak developed an agreement under which the officer agreed to perform whatever services might be necessary, for a period of six months, to accomplish an orderly transition of responsibilities to his or her successor, and to complete unfinished assignments. This was sufficient to avoid the "deferred compensation" objection and therefore did not violate the limitation. B-175155, October 3, 1974; B-175155, September 5, 1974.

Another source of Amtrak's powers is the District of Columbia Business Corporation Act, which applies to Amtrak to the extent consistent with the Rail Passenger Service Act. 49 U.S.C. § 24301(e). Thus, Amtrak can sell real property (B-175155, June 14, 1978),[185] and it can make loans, provided they serve a corporate purpose (B-207880-O.M., November 5, 1982), because both actions are authorized under the District of Columbia law.

7. Application of Other Laws

A government corporation's autonomy, while conferring considerable spending discretion, does not remove it from the coverage of all laws of the United States. We set forth here several laws governing the operations of federal agencies. As one would

[185]Sometimes, dealing with GAO case law can be a complicated, confusing, and even daunting task. For one thing, GAO has tended to re-use "B" file designations for similar subjects—counting on "sub-numbers" and dates to distinguish between different cases. This made proofing this manual difficult, and careful reading of it critical. For example, in the preceding textual discussion of Amtrak, how many different GAO items with the B-file designation "B-175155" can you find? (Hint: There are 12.)

expect, wholly owned corporations are subject to more of the laws than mixed-ownership corporations, which are in turn subject to more than the so-called "non-instrumentality" corporations. A summary chart, including some laws not covered here, may be found in Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14, App. III (December 1995).

a. Civil Service Laws

We use the term "civil service laws" to mean the body of laws in Title 5 of the U.S. Code governing the appointment, classification, pay, allowances, and other benefits of federal officers and employees. The applicability of Title 5, or portions thereof, to a government corporation depends on (1) the definitions in Title 5, and (2) the corporation's own charter.[186] Title 5 includes a few general definitions and a great many specific ones. Section 105 of 5 U.S.C. defines "Executive agency" to include government corporations. "Government corporation" is defined as "a corporation owned or controlled by the United States." 5 U.S.C. § 103(1). "Government controlled corporation" does not include a corporation owned by the United States. 5 U.S.C. § 103(2). In addition, 5 U.S.C. § 2105(a) defines "employee" as someone appointed in the civil service by, as pertinent here, the President, "an individual who is an employee under this section" (which would include wholly owned corporations), or "the head of a Government controlled corporation." GAO has interpreted "government controlled corporation" in these definitions to mean a mixed-ownership government corporation. B-221677, July 21, 1986.

Thus, unless it specifically provides otherwise, a provision in Title 5 that applies to an "Executive agency," a "Government corporation," or an "employee" applies to wholly owned and mixed-ownership government corporations. E.g., 5 U.S.C. § 2301(a) (merit system principles apply to "an Executive agency"); 5 U.S.C. §§ 8701(a)(1),

[186]GAO observed in 1943 that "there can not be stated any broad generality that persons employed by the Government's corporations are or are not employees of the United States for all purposes." B-37559, November 5, 1943, at 3, quoted in 23 Comp. Gen. 815, 816 (1944). Dr. Moe wrote in 1995 that approximately one half of the government corporations were subject to the civil service laws and that the exemptions, "both partial and complete," were "numerous and complex." That statement has retained its veracity. Moe 1995, supra note 41, at 56.

8901(1)(A) (provisions for group life and group health insurance apply to employee as defined in § 2105).

A provision applicable to an Executive agency but not a government controlled corporation applies to wholly owned, but not mixed-ownership, government corporations. A good example is what is perhaps the heart of the civil service system, the provisions governing classification (5 U.S.C. ch. 51) and pay (ch. 53, subch. III). The classification chapter applies to Executive agencies but not government controlled corporations. 5 U.S.C. § 5102(a)(1)(A), (i). Subchapter III of chapter 53 adopts the definition of section 5102. 5 U.S.C. § 5331(a). Thus, unless specified otherwise, the classification and pay provisions apply to wholly owned, but not mixed-ownership, corporations. An illustrative case containing important discussion is Dockery v. Federal Deposit Insurance Corporation, 64 M.S.P.R. 458 (1994) (FDIC, a mixed-ownership corporation, not subject to classification laws).

The following inventory does not purport to be complete:

Whistleblower Protection Act—excludes government corporations, except with respect to improper personnel actions resulting from disclosure of information the employee reasonably believes evidences a violation of law, gross mismanagement, gross waste of funds, an abuse of authority, or substantial danger to public health or safety, with certain qualifications. 5 U.S.C. §§ 2302(a)(2)(C), (b)(8).

Experts and consultants—applies to wholly owned, but not mixed-ownership, government corporations. 5 U.S.C. § 3109(a).

Senior Executive Service—does not apply to government corporations. 5 U.S.C. § 3132(a)(1).

Government Employees Training Act—applies to “a Government corporation subject to chapter 91 of title 31,” that is, both wholly owned and mixed-ownership corporations subject to the Government Corporation Control Act. 5 U.S.C. § 4101(1)(C).

Performance appraisal system—not applicable to government corporations. 5 U.S.C. § 4301(1)(i). E.g., B-233528, December 14, 1988 (Overseas Private Investment Corporation not required to submit its performance appraisal system for review by OPM.)

Government Employees Incentive Awards Act—applies to both wholly owned and mixed-ownership corporations. 5 U.S.C. §§ 4501(1)(A), (2)(A).

Dual compensation laws—apply to government corporations. 5 U.S.C. § 5531(2). E.g., B-238303, B-236399, May 29, 1991 (retired military officer employed by FDIC).[187] They do not apply to corporations statutorily designated as not agencies or instrumentalities of the United States. B-170582, July 15, 1976. For a corporation subject to the dual compensation laws, using a personal services contract rather than employment in order to avoid the statutory restrictions is improper. Of course, GAO can do no more than report the matter to Congress. B-222334, June 2, 1986.[188]

Severance pay—applies to government corporations. 5 U.S.C. § 5595(a)(1)(A). E.g., B-114839-O.M., August 11, 1978 (former Panama Canal Company). The statute expressly excludes employees, other than members of the Senior Executive Service, paid at or in excess of Executive Schedule levels. 5 U.S.C. § 5595(a)(2)(i). Since the SES does not extend to government corporations, the president of a government corporation who is compensated at an Executive Schedule level is not entitled to severance pay. B-215273, June 28, 1984.

[187]Under an earlier version of the statute without the explicit definition, the Court of Claims had held that the United States Shipping Board Emergency Fleet Corporation was a private corporation and not part of the government for purposes of the dual compensation laws. Dalton v. United States, 71 Ct. Cl. 421 (1931). Apart from the statutory changes, the case can be disregarded, even though not directly overruled, because it was one of the rare instances in which Congress refused to appropriate funds to pay the judgment. See First Deficiency Act, 1932, Act of February 2, 1932, ch. 12, title II, § 3, 47 Stat. 15, 28; 23 Comp. Gen. 815, 817 (1944).

[188]As noted earlier, a government corporation empowered to determine the character and necessity of its expenditures, as was the corporation in this case, is not required to follow the government's policy on personal service contracts. Intimations to the contrary notwithstanding, the contract in B-222334 was objectionable, not because it was a personal services contract per se, but because it was used to circumvent the statutory restriction on compensation.

Back Pay Act—applies to government corporations. 5 U.S.C. § 5596(a)(1). E.g., Payne v. Panama Canal Company, 607 F.2d 155 (5th Cir. 1979) (former Panama Canal Company subject to Back Pay Act, notwithstanding its power to sue and be sued in its own name).

Travel and transportation—The travel and transportation provisions of 5 U.S.C. ch. 57, subch. I and II, apply to wholly owned, but not mixed-ownership, corporations. 5 U.S.C. §§ 5701(1)(A), (i) , 5721(1). E.g., B-214811, July 25, 1984 (internal memorandum) (wholly owned corporation should not reimburse travel expenses of official's spouse unless spouse was providing some sort of direct service to government). The Federal Deposit Insurance Corporation, as a mixed-ownership corporation, is not subject to the provisions governing service agreements in return for payment of relocation expenses. However, work for the FDIC qualifies as "government service" for purposes of fulfilling the agreement. B-221677, July 21, 1986.

Uniform allowance—applies to wholly owned government corporations. 5 U.S.C. § 5901(a).

Annual and sick leave—applies to government corporations, both wholly owned and mixed-ownership. 5 U.S.C. § 6301(2)(A).

Federal Employees Compensation Act—FECA's definition of "employee" includes "an officer or employee of an instrumentality wholly owned by the United States." 5 U.S.C. § 8101(1)(A). FECA, where it applies, is the employee's exclusive remedy just as it is for employees of non-corporate agencies. Pinto v. Vessel "Santa Isabel," 492 F. Supp. 689 (D.C.Z. 1980) (former Panama Canal Company); Posey v. TVA, 93 F.2d 726 (5th Cir. 1937) (TVA).

Retirement—Both the Civil Service Retirement System and the Federal Employees Retirement System apply to employees as defined in 5 U.S.C. § 2105, and therefore apply to government corporations. 5 U.S.C. §§ 8331(1)(A), 8401(11)(A)(CSRS, FERS, respectively).

A law related in subject matter to Title 5 is the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, which provides, among other things, for overtime compensation for time worked in excess of 40 hours in a week. The FLSA adopts the definition of Executive agency of

5 U.S.C. § 105, and therefore includes government corporations. E.g., 54 Comp. Gen. 617 (1975) (FLSA applicable to former Panama Canal Company). Another relevant statute is Title VII of the Civil Rights Act of 1964. Its employment discrimination provisions apply to "executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds)." 42 U.S.C. § 2000e-16(a).

The general and specific Title 5 definitions determine the applicability of various provisions to government corporations only in the absence of more specific direction in the legislative charter. Government corporations are commonly empowered to "appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required." E.g., 29 U.S.C. § 1302(b)(6) (PBGC). This alone, while affording some discretion, does little more than authorize appointment and compensation within the civil service structure. A variation specifically makes the authority subject to the civil service laws. E.g., 33 U.S.C. § 984(a)(7) (St. Lawrence Seaway Development Corporation). The comparable provision for the Inter-American Foundation limits the total number of employees. 22 U.S.C. § 290f(e)(5). An example of seemingly broader language is 7 U.S.C. § 5903(n)(3), as amended by the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 723, 110 Stat. 888, 1115, providing that officers or employees of the Alternative Agricultural Research and Commercialization Corporation "shall be subject to all laws of the United States relating to governmental employment."

An important variation authorizes appointment and compensation without regard to the civil service laws applicable to officers and employees of the government. E.g., 16 U.S.C. § 831b (Tennessee Valley Authority); 7 U.S.C. § 943(d) (Rural Telephone Bank). The "without regard" authority is not an "all or nothing" proposition. The corporation may, in its discretion, appoint some employees in accordance with the civil service laws and invoke the exemption for others. 37 Op. Att'y Gen. 7 (1932). Of course, the "discretion" should be reasoned and not arbitrary. Some charters exempt only a portion of the corporation's employees from the civil service laws. E.g., 22 U.S.C. § 2193(d) (Overseas Private Investment Corporation may hire, pay, and fire up to 20 of its employees without regard to civil service laws). A corporation possessing the "without regard" authority is, to the extent of its coverage, not required to follow, for example, the dual compensation laws (19 Comp. Gen. 926 (1940); B-9113, April 30, 1940),[189] or the laws governing annual and sick leave (A-49652, June 28, 1933). It is free to set up its own parallel system. See, e.g., TVA v. Kinzer, 142 F.2d 833 (6th Cir. 1944), discussing TVA's retirement system. As the Attorney General has pointed out, the inclusion of the "without regard" clause in some charters evidences the congressional understanding that the employees would otherwise be subject to the civil service system, else there would be no need to exempt them. 39 Op. Att'y Gen. 238, 241 (1939).

One thing GAO has been reluctant to sanction is the making of deductions from an employee's salary for payment to private organizations, and has advised that statutory authority should be obtained before making deductions for union dues (B-105819, December 19, 1951) or a union pension and welfare fund (32 Comp. Gen. 572 (1953)). Both decisions suggest, however, that the corporation could use its power to fix compensation to include these items in the amount of compensation actually paid to the employee, who would then make the contributions, subject to any statutory limits on total compensation payable. See also B-82293, January 3, 1949 (similar holding with respect to life and health insurance premiums prior to the enactment of the general legislation now in Title 5). Presumably, had the authority to fix compensation in these cases included the "without regard" clause, there would have been no objection to making the deductions.

The "without regard" authority may itself have qualifications which may extend beneficial provisions and/or impose restrictions. For example, 16 U.S.C. § 831b includes two qualifications for TVA employees: they are covered by the Federal Employees Compensation Act, and their salaries may not exceed that of board members. In GAO's view, the authority to fix compensation, even with the "without regard" language, is not sufficient to overcome explicit salary restrictions in TVA's charter, and GAO has found unauthorized payments variously called retention payments, management staffing incentive payments, merit incentive

[189]Earlier decisions to the contrary, such as 14 Comp. Gen. 527 (1935) and 14 Comp. Gen. 822 (1935), must be regarded as implicitly overruled by the decisions cited in the text. Why this was not done explicitly is not clear.

supplemental retirement income payments, etc., although TVA itself has the last word, at least at the administrative level. B-222334, June 2, 1986; B-205284, November 16, 1981.

In addition to charter exemptions, other specific exemptions are scattered throughout Title 5. For example, the Government Employees Incentive Awards Act does not apply to TVA or the Central Bank for Cooperatives, 5 U.S.C. § 4501(1), (i), (ii); the severance pay statute does not apply to TVA, 5 U.S.C. §5595(a)(2)(vii); the annual and sick leave laws and the group health insurance provisions do not apply to corporations supervised by the Farm Credit Administration "if private interests elect or appoint a member of the board of directors," 5 U.S.C. §§ 6301(2)(vii), 8901(1)(i). The exemption for the farm credit corporations is repeated in 5 U.S.C. § 6308(a), which authorizes the transfer of annual and sick leave balances when an employee transfers to a position under a different leave system without a break in service. The exemption was repeated to permit those corporations to make lump-sum payments for leave rather than transferring the balances. See B-124592, December 1, 1955.

If a corporation is designated as not an agency or instrumentality of the United States, its employees are not employees of the United States. Hrubec v. National Railroad Passenger Corporation, 49 F.3d 1269, 1270 (7th Cir. 1995), and 902 F. Supp. 149 (N.D. Ill. 1995) (Amtrak). Accordingly, Title 5 would not apply. However, Congress may incorporate restrictions in the corporate charter. For example, employees of the Legal Services Corporation are not considered employees of the United States but are subject to Title 5 provisions relating to retirement, life insurance, health insurance, and work injuries. 42 U.S.C. §§ 2996d(e), (f). Officers and employees of the Corporation for Public Broadcasting are similarly not officers or employees of the United States, but their annual rate of pay may not exceed the "rate of basic pay in effect from time to time for level I of the Executive Schedule." 47 U.S.C. § 396(e)(1).

b. Procurement Laws and Regulations

In contrast to the civil service laws, the applicability of procurement laws and regulations to government corporations is fairly simple: They apply, for the most part, to wholly owned government corporations, but not to mixed-ownership corporations and certainly not to "non-instrumentalities."

(1) 41 U.S.C. § 5

Perhaps the oldest general procurement law still on the books, 41 U.S.C. § 5—the old Revised Statutes § 3709—requires that, unless otherwise provided and with several stated exceptions, "purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals." As noted in our earlier discussion of the applicability of fiscal laws, this statute was revised as part of the Administrative Expenses Act of 1946. It applies to the administrative expenses of wholly owned government corporations. 41 U.S.C. §§ 5 (last sentence), 5a. It does not apply to mixed-ownership corporations. E.g., B-138105-O.M., March 4, 1959.

GAO has not attempted to define "administrative expenses" for this law any more than it has for other laws. Rather, GAO has followed a case-by-case approach. For example, "[t]he procurement of grain storage structures [by the Commodity Credit Corporation] obviously is not an administrative expense" for purposes of the advertising statute. B-119791, October 22, 1954. Nor is the construction and equipping of a substation by the former Panama Canal Company. B-122655, April 7, 1955. Nor is the purchase of a generating set for supplying electric power. B-114990, August 19, 1953.

(2) Federal Property and Administrative Services Act

The primary statute governing the procurement of goods and services by the civilian agencies of the federal government is title III of the Federal Property and Administrative Services Act of 1949 (the Property Act), codified in 41 U.S.C. ch. 4, subch. 4. Subsections 3(a) and (b) of the original Property Act, 63 Stat. 378, defined "federal agency" to include "executive agency," which in turn includes "any wholly owned Government corporation." Therefore, the procurement provisions of the Property Act, as amended, apply to wholly owned government corporations unless exempt under 40 U.S.C. § 474 or comparable statutory authority.[190]

[190]The Property Act addresses property management as well as procurement. The property management portions are located in Title 40, along with the definitions, now found in 40 U.S.C. §§ 472(a) and (b). Placing the operative provisions in more than one title of the U.S. Code does not change the application of the statutory definitions.

The Property Act applies to the procurement of property and services, but not to every type of contractual arrangement an agency or corporation may enter into. For example, the Overseas Private Investment Corporation is authorized to enter into arrangements with the private insurance industry for risk-sharing under its foreign investment insurance program. 22 U.S.C. § 2194(f). GAO reviewed one such pooling proposal and found that it was not the procurement of goods or services, but was more in the nature of a cooperative agreement. Therefore, it was not subject to the procurement laws and regulations. B-173240, June 16, 1975.

The statute also addresses the relationship of the Property Act procurement provisions to 41 U.S.C. § 5. Basically, 41 U.S.C. § 5 does not apply to procurements under the Property Act. An agency or wholly owned corporation which is exempt from the Property Act provisions remains subject to 41 U.S.C. § 5 unless it has specific authority to contract without regard to 41 U.S.C. § 5. An entity with such authority must still follow the Property Act provisions for other than sealed-bid procedures unless exempt from that too. 41 U.S.C. §§ 252(a)(2), 260.

(3) <u>Office of Federal Procurement Policy Act</u>

The Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974), established the Office of Federal Procurement Policy in the Office of Management and Budget to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies." 41 U.S.C. § 404(a). This Act defines "executive agency" to include "a wholly owned Government corporation fully subject to the provisions of [the Government Corporation Control Act]." 41 U.S.C. § 403(1)(D). Thus, wholly owned government corporations must comply with government-wide procurement polices and procedures.

(4) <u>Federal Acquisition Regulation</u>

The Federal Acquisition Regulation (FAR), found in Title 48 of the Code of Federal Regulations, is the governmentwide body of procurement regulations which implement the Property Act and the Office of Federal Procurement Policy Act. The FAR defines the term "federal agency" as including an "executive agency," and the term "executive agency" as including any wholly owned government corporation listed in the Government Corporation Control Act. 48 C.F.R. § 2.101.

The Pension Benefit Guaranty Corporation, as a wholly owned corporation, is subject to the FAR for purposes of its administrative activities, but not when serving as trustee for terminated pension plans. Of course, as with any exemption, the corporation can, in its discretion, elect to follow the established procedures. B-217281-O.M., March 27, 1985 (procurement of investment manager services in its trustee capacity).

The procurement statutes and the FAR have no application to corporations which are designated as not agencies or instrumentalities of the United States, even though they may be federally created and funded. B-223852, September 9, 1986 (Legal Services Corporation); Analysis of Amtrak's Acquisition of Office Copying Equipment, GAO/CED-82-111, July 12, 1982.

(5) Competition in Contracting Act

The Competition in Contracting Act (CICA), title VII of the massive Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175, made a number of revisions in procurement-related provisions. As relevant here, section 2741, 98 Stat. at 1199, gave a statutory basis to GAO's bid protest function (31 U.S.C. §§ 3551-3556). Prior to CICA, GAO's bid protest authority was not explicit but was derived from its account settlement authority. E.g., Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313 (D.C. Cir. 1971). CICA divorced the bid protest function from account settlement. CICA applies to procurements by a "federal agency," which it defines by reference to the Property Act, 40 U.S.C. § 472 (see above). In other words, it expressly includes wholly owned government corporations.

Since CICA hinges on the definition of "federal agency," account settlement authority or lack thereof is irrelevant, and GAO has CICA jurisdiction over corporations exempt under the pre-CICA system. 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority). As with the pre-CICA system, the jurisdiction does not extend to mixed-ownership corporations. E.g., B-252085, January 26, 1993.

Also not dispositive is the applicability or non-applicability of the Property Act and the FAR. The Bonneville Power Administration, for example, is not subject to the Property Act's procurement provisions or to the FAR. See 16 U.S.C. § 832a(f) and 40 U.S.C. § 474(d)(20). Nevertheless, it meets the CICA definition of "federal agency," and is therefore subject to GAO's bid protest jurisdiction. 68 Comp. Gen. 447 (1989); 67 Comp. Gen. 8 (1987). Naturally, as was done in the two cited cases, GAO will apply Bonneville's own regulations rather than the FAR in evaluating the protest.

(6) Other statutes

The laws listed above are the ones we regard as most important to the procurement function. There are, however, several other procurement-related statutes. Some address their applicability. For example, the Walsh-Healey Act (which mandates wage and labor standards for supply or equipment contracts over $10,000) applies to contracts made by "any corporation all the stock of which is beneficially owned by the United States." 41 U.S.C. § 35. Others do not expressly define their applicability as, for example, CICA and the Property Act do. One example is the Brooks Architect-Engineers Act, 40 U.S.C. §§ 541-544, which establishes procedures for the acquisition of architectural and engineering services. It uses, but does not define, the term "agency." 40 U.S.C. § 541(2). In an internal memorandum, B-215818-O.M., August 10, 1984, GAO considered whether this act applies to the Federal Deposit Insurance Corporation, and concluded that it does not, consistent with the clear congressional pattern of excluding mixed-ownership corporations from the coverage of procurement laws.

Another example is the Service Contract Act of 1965, 41 U.S.C. § 351, which prescribes minimum standards for wages and working conditions under contracts "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351(a). Like the Brooks Architect-Engineers Act, it does not define its own applicability. It has been held applicable to Federal Reserve banks. 2 Op. Off. Legal Counsel 211 (1978), approved and followed in Brink's, Inc. v. Board of Governors of the Federal Reserve System, 466 F. Supp. 116 (D.D.C. 1979). It has also been held applicable to a contract between a personnel referral firm and a federally funded research and development center, even though it would not apply to the contract between the center and its sponsoring agency because the latter would not meet the "principal purpose" qualification quoted above. Menlo Service Corp. v. United States, 765 F.2d 805 (9th Cir. 1985).

c. General Management Laws

We have included under this caption the series of laws, enacted during the last quarter of the 20th century, designed to enhance the management, general and financial, of government entities in the broad sense.

(1) Inspector General Act

The Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101), as amended, is found in 5 U.S.C. Appendix 3. Its purpose is to create independent and objective units to conduct audits and investigations of the agency's programs and operations. 5 U.S.C. App. 3 § 2.

This Act divides the federal government into three categories—establishments, designated federal entities, and other federal entities. The Act defines "establishment" by listing the agencies and instrumentalities covered, starting with the cabinet departments. 5 U.S.C. App. 3 § 11(2). The listing includes a few government corporations, such as the Community Development Financial Institutions Fund, the Federal Deposit Insurance Corporation, and the Corporation for National and Community Service. Id. Each establishment is required to have an Office of Inspector General, the head of which is appointed by the President with the advice and consent of the Senate. 5 U.S.C. App. 3 §§ 2, 3(a).

"Designated federal entity" is similarly defined by listing the entities covered, and includes several more government corporations and several "non-instrumentalities"—Amtrak,[191] Corporation for Public Broadcasting, Legal Services Corporation, Pension Benefit Guaranty Corporation, Tennessee Valley Authority. 5 U.S.C. App. 3 § 8G(a)(2). It also includes the Farm Credit Administration and the National Credit Union Administration, which are not themselves government corporations but which supervise government corporations. A designated federal entity must have an Office of Inspector General,

[191]Amtrak will be dropped from the statutory coverage when it is able to operate for a fiscal year without federal subsidy. Pub. L. No. 105-134, § 409, 111 Stat. 2570, 2586 (1997).

whose head is appointed by the head of the entity. 5 U.S.C. App. 3 § 8G(b), (c).

The term "federal entity" includes government corporations as defined in 5 U.S.C. § 103, which means both wholly owned and mixed-ownership, except for corporations already listed as either establishments or designated federal entities, or which are part of an entity in either of those groups. 5 U.S.C. App. 3 § 8G(a)(1). A "federal entity" is not statutorily required to have an Office of Inspector General, but must report annually on its internal audit structure to the Office of Management and Budget and to the Congress. 5 U.S.C. App. 3 § 8G(h)(2). The corporations selected for "designated federal entity" status are those receiving the largest amounts of federal funds. See H.R. Rep. No. 100-771 at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3154, 3155.

(2) Federal Managers' Financial Integrity Act of 1982

The Federal Managers' Financial Integrity Act of 1982 (FMFIA), Pub. L. No. 97-255, 96 Stat. 814, establishes a framework for evaluating internal controls. Section 2, 31 U.S.C. §§ 3512(c) and (d), requires each executive agency to develop, in accordance with standards prescribed by the Comptroller General, a system of internal accounting and administrative controls, and to report each year, under Office of Management and Budget guidelines, on the extent of its compliance. The applicable definitional section is 31 U.S.C. § 3501, which excludes "a corporation, agency, or instrumentality subject to [the Government Corporation Control Act]." Therefore, section 2 of FMFIA by its own force has no application to government corporations.

However, the annual management report, added to the Government Corporation Control Act by the Chief Financial Officers Act (see below), requires the inclusion of—

> "a statement on internal accounting and administrative control systems by the head of the management of the corporation, consistent with the requirements for agency statements on internal accounting and administrative control systems under the amendments made by the Federal Managers' Financial Integrity Act of 1982."
> 31 U.S.C. § 9106(a)(2)(E).

Accordingly, while FMFIA does not apply by its own terms, the Control Act contains a parallel requirement.

(3) Chief Financial Officers Act

The Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838, as amended, requires the establishment of Chief Financial Officers in specified agencies, but includes no government corporations. 31 U.S.C. § 901. The act did, however, revise the audit and management reporting provisions of the Government Corporation Control Act, as summarized earlier in our coverage of the Control Act. Section 301 of the act, 31 U.S.C. § 3512(a), requires OMB to include information about government corporations in the financial management status reports and governmentwide five-year financial management plans it must prepare for the Congress.

(4) Government Performance and Results Act

The Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285, is designed to improve efficiency and effectiveness in the federal government by requiring agencies to set performance goals and to measure results against those goals. Section 3 of GPRA, 5 U.S.C. § 306, requires each agency to submit to Congress and OMB to update periodically, a "strategic plan," which must include a mission statement and the agency's goals and objectives for at least a five-year period. Section 4 of GPRA, 31 U.S.C. §§ 1115 and 1116, requires agencies to prepare annual performance plans and program performance reports. GPRA's definition of "agency" is "an Executive agency defined under [5 U.S.C. §] 105," with several exceptions not relevant here. 5 U.S.C. § 306(f); 31 U.S.C. § 1115(f)(1). Therefore, GPRA applies to corporations owned or controlled by the United States.

(5) Government Management Reform Act of 1994

The Government Management Reform Act of 1994 requires Treasury to prepare annual consolidated financial statements "covering all accounts and associated activities of the executive branch of the United States Government." Pub. L. No. 103-356, § 405(c), 108 Stat. at 3410,3416 (1994), 31 U.S.C. § 331(e). GAO is required to audit these consolidated statements. Id. at 3417. Since the statements are to cover the entire executive branch, they include those government corporations that are in the executive branch. See Financial Audit: 1997 Consolidated Financial Statements of the United States

Government, GAO/AIMD-98-127, Appendix (agencies included and excluded) (March 1998).

(6) Federal Financial Management Improvement Act of 1996

This law concerns agency financial management systems. It does not apply to government corporations because it defines "agency" by incorporating the definition in 31 U.S.C. § 901(b), which does not include any government corporations. 31 U.S.C. § 3512 note (Sec. 806(i)).

d. Property Management

The primary law governing the use and disposal of property is the Federal Property and Administrative Services Act of 1949. The pertinent definitions are found in 40 U.S.C. §§ 472(a) and (b), under which the term "federal agency" includes "executive agency," and executive agency includes "any wholly owned Government corporation." Naturally, there are exceptions. For example, 40 U.S.C. § 474(c) exempts government corporations from the provisions relating to GAO approval of property accounting systems (40 U.S.C. § 486(b)) and GAO audit of property accounts (40 U.S.C. § 487(c)). The Tennessee Valley Authority is partially exempt by virtue of 40 U.S.C. § 474(d)(12). The rule is, therefore, that absent an applicable exemption, provisions of the Property Act applicable to "federal agencies" or "executive agencies" apply to wholly owned government corporations.

Section 481 of 40 U.S.C. gives the General Services Administration a variety of responsibilities with respect to the procurement and storage of personal property, including public utility services. This applies to wholly owned corporations by virtue of 40 U.S.C. § 472(a). The law further directs GSA to provide these services upon request to mixed-ownership corporations as well. 40 U.S.C. § 481(b)(1). This would include such services as the use of federal supply schedules.

The disposition of excess property is covered in 40 U.S.C. § 483. Reimbursement of fair value is required in the case of a transfer from one agency to another when either the transferring agency or the receiving agency is a corporation under the Government Corporation Control Act. 40 U.S.C. § 483(a)(1). The purpose of this provision is to—

"maintain the integrity of the corporate accounts; that is, to prevent the impairment of the capital assets of a corporation disposing of excess property or the unjust enrichment of a corporation receiving such excess property." B-119819, December 1, 1954, at 2.

Transfer may be made without reimbursement in situations where it would not impair a corporation's capital structure—uncommon in the case of a government corporation, but possible nevertheless. Id.; B-129149, September 28, 1956.

Section 484 of 40 U.S.C. addresses surplus property and is also applicable to wholly owned corporations. Under subsection (c), the disposing agency may "execute such documents for the transfer of title or other interest in property" as deemed appropriate. This includes transfers of title to real property from a wholly owned corporation to the United States, as and to the extent required by regulation. 41 Op. Att'y Gen. 15 (1949) (dealing with identical language in predecessor statute).

Proceeds from the sale of surplus property, as well as reimbursements from the transfer of excess property, are governed by 40 U.S.C. § 485, which generally directs their deposit as miscellaneous receipts. 40 U.S.C. § 485(a). However, an exception specified in 40 U.S.C. § 485(c) provides that:

"Where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts, then the net proceeds of the disposition or transfer shall be credited to the reimbursable fund . . . ."

The quoted provision also applies to foreign excess property disposed of for United States currency. 40 U.S.C. § 513. These provisions authorize the crediting of proceeds to the revolving fund of a government corporation, even where the property was originally acquired with appropriated funds. B-99032-O.M., February 9, 1953 (disposal of dredge by former Panama Canal Company).

GSA's leasing authority is found in 40 U.S.C. § 490. It, too, applies to wholly owned corporations by virtue of 40 U.S.C. §§ 472(a) and 129. As with personal property services, GSA may extend its buildings services (operation, maintenance, protection) to a mixed-ownership corporation upon request. 40 U.S.C. § 490(b). An odd situation occurred in 38 Comp. Gen. 565 (1959). The Federal National

Mortgage Association—"Fannie Mae"—started out in life as a wholly owned government corporation, was rechartered as a mixed-ownership government corporation, and is now a government-sponsored enterprise. In 1959, it was a mixed-ownership corporation, but Congress had chosen to retain it in the Government Corporation Control Act as a wholly owned corporation. The question was whether Fannie Mae was required to do its leasing through GSA. The continued listing as a wholly owned corporation, the decision reasoned, was only for purposes of the Control Act. Absent some other definition, the "actual organic structure of the corporation" should determine its status. 38 Comp. Gen. at 567. Therefore, for purposes of leasing authority, Fannie Mae was a mixed-ownership corporation and thus not required to lease office space through GSA. See also B-161531, June 29, 1967.

Another pertinent statute is the Public Buildings Act. It applies to wholly owned corporations and to several specified mixed-ownership corporations, one of which is the Federal Deposit Insurance Corporation. 40 U.S.C. §§ 612(1), (3), (4). Thus, an office building proposed to be constructed by the FDIC would be a "public building" and therefore subject to the Public Buildings Act, except for the prospectus approval requirement. B-143167-O.M., September 27, 1960.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. ch. 61, also applies to wholly owned government corporations. 42 U.S.C. § 4601(1).

e. Freedom of Information, Privacy Acts

The Administrative Procedure Act defines "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with a list of exceptions not relevant to this discussion. 5 U.S.C. § 551(1). The Freedom of Information Act (FOIA) provides that "'agency' as defined in section 551(1) of this title includes any . . . Government corporation [or] Government controlled corporation." 5 U.S.C. § 552(f)(1). The Privacy Act provides that "the term 'agency' means agency as defined in section 552(e) of this title." 5 U.S.C. § 552a(a)(1). Thus, the extent to which FOIA and the Privacy Act apply to government corporations should be the same since they use the same definition.

Given the plain statutory language, the "traditional" types of government corporations—wholly owned and mixed-ownership—do not appear to have presented problems. E.g., Jones v. NRC, 654 F. Supp. 130, 131 (D.D.C. 1987) (FOIA applies to TVA); Stephens v. TVA, 754 F. Supp. 579 (E.D. Tenn. 1990) (Privacy Act suit against TVA with no suggestion of any concern over applicability). If these traditional government corporations are at the "clearly covered" extreme, at the other, "clearly not covered" extreme, are private corporations which receive federal financial assistance, even with a slight amount of federal supervision. Forsham v. Harris, 445 U.S. 169 (1980) (holding FOIA inapplicable to a private grantee).

The difficult cases occupy the "gray area" between these poles. The case of Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976), found FOIA applicable to the Federal Home Loan Mortgage Corporation ("Freddie Mac"), a government-sponsored enterprise. The court listed the factors it found relevant, acknowledging that none of them alone would be sufficient:

> "It is federally chartered, its Board of Directors is Presidentially appointed, it is subject to close government supervision and control over its business transactions, and to federal audit and reporting requirements. In addition, the Corporation is expressly designated an 'agency,' and its employees are officers and employees of the United States, for a number of purposes." Id. at 180.

Taken together, these "federal characteristics dictate the conclusion that it is the kind of federally created and controlled entity" that Congress intended to include under the term "Government controlled corporation." Id. at 181.[192]

Amtrak is subject to FOIA by virtue of 49 U.S.C. § 24301(e). However, it is not a government-controlled corporation for purposes of the Privacy Act. Ehm v. National Railroad Passenger Corporation, 732 F.2d 1250 (5th Cir. 1984). The issue had become somewhat clouded by some legislative history that could be used to support applicability, as GAO had done in 57 Comp. Gen. 773 (1978). See also

[192]Legislation in 1989 largely privatized Freddie Mac and severed most of its federal ties. We cite Rocap merely to illustrate the kinds of factors that influenced the court. The holding is no longer directly applicable. See Liberty Mortgage Banking, Ltd. v. Federal Home Loan Mortgage Corp., 822 F. Supp. 956, 958-960 and n.7 (E.D.N.Y. 1993).

63 Comp. Gen. 98 (1983) (declining to consider the matter further in view of the then-pending Ehm litigation). The Ehm court reviewed the legislative history, found it inconclusive, and found Amtrak closer to the Corporation for Public Broadcasting, which was indisputably intended to be excluded. Ehm, 732 F.2d at 1254-55.

A related statute is the Government in the Sunshine Act, 5 U.S.C. § 552b which requires, among other things, that every meeting of an agency be announced in advance and open to the public, unless otherwise excepted. It defines “agency” as an agency (1) within the FOIA/Privacy Act definition, which explicitly includes government corporations and government controlled corporations, and which is (2) “headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President.” 5 U.S.C. § 552b(a)(1). A corporation’s board of directors is a “collegial body.” 57 Comp. Gen. at 775; 63 Comp. Gen. at 99. While Ehm supersedes these cases insofar as they deal with Amtrak, the general points remain valid, and many government corporations are subject to the Sunshine Act.

Of course, as it did with Amtrak, Congress can exclude or include government or quasi-government corporations under these laws. 1 Op. Off. Legal Counsel 126, 131-132 (1977).

A final information-related statute we may mention is the Paperwork Reduction Act of 1980 (which replaced the Federal Reports Act of 1942), 44 U.S.C. ch. 35. It gives OMB certain oversight and regulatory responsibilities with respect to the collection of information from the public. Its definition of “agency” is essentially the same as that of FOIA and the Privacy Act in that it expressly includes government corporations and government controlled corporations. 44 U.S.C. § 3502(1).

f. Printing and Binding

Subject to a few exceptions, all printing and binding for “every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office.” 44 U.S.C. § 501. Title 44 does not further define the applicability of this provision. Although the cases must be approached with some caution, the rule is that a government corporation empowered to determine the character and necessity of its expenditures is not required to comply with 44 U.S.C. § 501.

The earliest decision appears to be A-49652, June 28, 1933, in which GAO advised that the Home Owners' Loan Corporation was not required to have its printing done at the Government Printing Office. Yet in 14 Comp. Gen. 695 (1935), GAO held that the Federal Savings and Loan Insurance Corporation was subject to the requirement. The difference was that the Home Owners' Loan Corporation had the statutory "character and necessity" power, whereas the FSLIC did not. FSLIC was given that power shortly thereafter, and GAO then confirmed that it, too, was now exempt. A-60495, October 4, 1938. The two corporations subsequently adopted resolutions to serve as their determination of non-applicability, and GAO concurred. A-98289, January 18, 1939 (HOLC); A-98289/A-60495, January 18, 1939 (FSLIC). See also 18 Comp. Gen. 479 (1938); 14 Comp. Gen. 698 (1935). GAO has applied the same result to other government corporations and similar entities. E.g., B-209585, January 26, 1983 (TVA); B-114829, July 8, 1975 (Postal Service). A corporation not subject to 44 U.S.C. § 501 may still elect to follow it. A-49217, June 5, 1933.

By coincidence, all of the government corporations GAO had considered possessed the variety of "character and necessity" authority which included the "without regard to other provisions of law" clause. A 1986 decision, 65 Comp. Gen. 226, misinterpreted this coincidence and treated the "without regard" clause, rather than the basic "character and necessity" provision, as the basis for the exemption. While the actual holding of 65 Comp. Gen. 226 is correct—that a corporation not possessing the "character and necessity" power must follow 44 U.S.C. § 501—the discussion of the "without regard" clause is not. This is because 44 U.S.C. § 501 is a general statute; it does not expressly apply to government corporations. Therefore, as discussed above under the "Fiscal Autonomy" heading, a "character and necessity" provision is sufficient to permit its avoidance, without the need for the additional "without regard" clause.

As further evidence, again in 1949, the Institute of Inter-American Affairs responded to a budget cut by firing all of its auditors. An angered Congress threatened to respond by repealing its "character and necessity" power. See B-24827, March 24, 1949. As part of this process, GAO was asked to study which laws would be affected by such a repeal. The resulting statement listed the printing statute as one of the laws that had not previously applied but would in the event of repeal. See General Accounting Office Statement Concerning Effect of "Determine and Prescribe" Language on Conduct of Business by the Institute of Inter-American Affairs, June 22, 1949, 334 MS 1805A.

g. Criminal Code

Regardless of a corporation's autonomy, it is within the power of Congress to provide that a crime against a government corporation is a crime against the United States. The Supreme Court has said:

> "The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly or indirectly from itself, and turned the property over to its creature. The creator would not be subordinated to its own machinery." United States v. Walter, 263 U.S. 15, 17 (1932) (Holmes, J.).

Congress has implemented this power through several provisions of the Criminal Code (18 U.S.C.). The definition of "agency" includes—

> "any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 18 U.S.C. § 6.

Some statutes in which this definition can come into play are 18 U.S.C. §§ 286 (conspiracy to defraud United States or agency thereof through false claim); 287 (presenting false claim to United States or agency thereof); and 371 (conspiracy to defraud United States or agency thereof "in any manner or for any purpose"). An illustrative case is United States v. Samuel Dunkel & Co., 184 F.2d 894 (2d Cir. 1950), holding that fraud upon the former Federal Surplus Commodities Corporation was the same as fraud upon the United States for purposes of 18 U.S.C. § 371. This was an "easy" case since the corporation in question was statutorily designated as an agency of the United States. Id. at 898. In view of the language of 18 U.S.C. § 6, however, that designation would not appear to be necessary. See Walter, 263 U.S. at 18.

The "proprietary interest" language of 18 U.S.C. § 6 replaced language in prior laws referring to "any corporation in which the United States is a stockholder." See 18 U.S.C. §§ 286, 287 (Revision Notes). No minimum "proprietary interest" is specified to trigger applicability. Thus, the statute would apply to a corporation in which the proprietary interest is slight, the only qualification being that it must be an instrumentality of the government. Walter, 263 U.S. at 18. This ensures that the statute is restricted to its intended purpose, "government corporations," and eliminates situations in which the United States might, for example, acquire an interest in a private corporation through some sort of forfeiture.

"Proprietary interest" also includes non-stock government corporations. The Revision Note to 18 U.S.C. § 6 makes clear that this phrase "is intended to include those government corporations in which stock is not actually issued." A case applying this concept is Acron Investments, Inc. v. FSLIC, 363 F.2d 236, 239-240 (9th Cir. 1966), dealing with the identical "proprietary interest" language in 28 U.S.C. § 451 which was intended to parallel 18 U.S.C. § 6. Another is Government National Mortgage Association v. Terry, 608 F.2d 614 (5th Cir. 1979), applying Acron to "Ginnie Mae."

8. Claims and Lawsuits

a. Administrative Claims

(1) Claims settlement authority

The structure of administrative claims settlement in the federal government, described in detail in Chapter 12, consists of (1) a series of statutes, one example being the Federal Tort Claims Act, authorizing the final and conclusive settlement of claims either with or without judicial review, and (2) a general claims settlement statute, 31 U.S.C. § 3702(a), which picks up claims not covered by any of the specific statutes.

Government corporations generally have their own claims settlement authority by virtue of specific charter provisions, and are therefore not subject to 31 U.S.C. § 3702(a). The most direct approach is illustrated by section 722(a) of Pub. L. No. 104-127, 110 Stat. 888, 1114, 7 U.S.C. § 5902(f)(15), which provides that the Alternative Agricultural Research and Commercialization Corporation:

"may make final and conclusive settlement and adjustment of any claim by or against the Corporation or a fiscal officer of the Corporation."

While often cited in conjunction with a sue-and-be-sued clause or a "character and necessity" clause, this provision is sufficient to permit the corporation to administratively settle its own claims. Government corporations with this type of authority include the Tennessee Valley Authority,[193] the Commodity Credit Corporation,[194] and the corporate functions of the Federal Housing Administration.[195] The Bonneville Power Administration, consistent with its other corporate-like powers, has it too.[196]

GAO also has held that the power to sue and be sued, combined with the power to determine the character and necessity of expenditures, even without the explicit claims settlement power, is still sufficient to remove the corporation from the scope of 31 U.S.C. § 3702(a). B-179464, March 27, 1974; B-109766, January 20, 1959 (both dealing with the former Panama Canal Company).

(2) Federal Tort Claims Act

Prior to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, whether government corporations were subject to common-law tort suits was somewhat unclear. By 1939, the answer became settled in the affirmative. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381 (1939); Prato v. Home Owners' Loan Corporation, 106 F.2d 128 (1st Cir. 1939). See also 25 Comp. Gen. 685 (1946). When the FTCA was enacted in 1946 to remove much of the government's tort immunity, it included most, if not all, of the then-existing government corporations in the waiver. The Act defines "federal agency" as including "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Far from establishing a black-letter rule, however, the definition raises as many questions as it answers.

[193] E.g., B-124078, June 7, 1955. Naturally, the GAO decisions and opinions we cite involve claims submitted to GAO during the 75-year span that GAO possessed the general claims settlement authority. While GAO is no longer directly involved in the process, the principles themselves remain sound.

[194] B-200654, September 9, 1981; B-142771/B-143782, November 23, 1960; B-138489, March 25, 1959.

[195] 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429, 432 (1948); B-156202, March 9, 1965.

[196] B-129395, January 22, 1957; B-132855-O.M., October 1, 1957.

At a minimum, the definition should pick up wholly owned government corporations. The following have been found subject to the Act:

- The former Inland Waterways Corporation. Wickman v. Inland Waterways Corporation, 78 F. Supp. 284 (D. Minn. 1948). This appears to be the earliest published decision on the applicability of the FTCA to a government corporation.
- The former Federal Savings and Loan Insurance Corporation. FSLIC v. Quinn, 419 F.2d 1014 (7th Cir. 1969); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); Colony First Federal Savings and Loan Association v. FSLIC, 643 F. Supp. 410 (C.D. Cal. 1986).
- St. Lawrence Seaway Development Corporation. Handley v. Tecon Corp., 172 F. Supp. 565 (N.D.N.Y. 1959).
- Federal Housing Administration. Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967).
- Federal Prison Industries. See United States v. Demko, 385 U.S. 149 (1966). The Court in that case held that a prisoner injured while working for FPI could not sue under the FTCA because the compensation remedy provided under 18 U.S.C. § 4126 was his exclusive remedy. If the FTCA did not apply to FPI, there would have been no need to tackle the exclusivity question.

Our research has disclosed no case in which the FTCA was found inapplicable to a wholly owned government corporation on the basis of the section 2671 definition.

Turning to mixed-ownership corporations, the situation is less uniform. One court has held a Federal Home Loan Bank not a federal agency for FTCA purposes. Rheams v. Bankston, Wright & Greenhill, 756 F. Supp. 1004 (W.D. Tex. 1991). Another court reached the opposite result for the former Resolution Trust Corporation, influenced largely by the fact that "the RTC is an organization similar to, and in fact replaces the FSLIC," which, as noted above, was an agency under the FTCA. Park Club, Inc. v. Resolution Trust [Corporation], 742 F. Supp. 395, 398 (S.D. Tex. 1990), aff'd in part and rev'd in part on other grounds, 967 F.2d 1053 (5th Cir. 1992).

A sampling of cases involving the Federal Deposit Insurance Corporation (FDIC), another mixed-ownership corporation, indicates some of the consequences of the FTCA's applicability. Numerous cases have held that the FDIC is a "federal agency" for

FTCA purposes. E.g., Davis v. FDIC, 369 F. Supp. 277 (D. Colo. 1974). This is true regardless of whether the FDIC is acting in its receiver capacity or its corporate capacity. FDIC v. Hartford Insurance Co., 877 F.2d 590 (7th Cir. 1989); FDIC v. DiStefano, 839 F. Supp. 110, 121 (D.R.I. 1993). One important consequence is that if the tort is subject to one of the exemptions listed in 28 U.S.C. § 2680, recovery is precluded just as if the agency involved were not a corporation, and the corporation's "sue and be sued" power cannot be used to get in through the back door. FDIC v. Citizens Bank & Trust Co., 592 F.2d 364 (7th Cir. 1979) (exemption for execution of statute or regulation); Safeway Portland Employees' Federal Credit Union v. FDIC, 506 F.2d 1213 (9th Cir. 1974) (misrepresentation and deceit); Freeling v. FDIC, 221 F. Supp. 955 (W.D. Okla. 1962), aff'd, 326 F.2d 971 (10th Cir. 1963) (slander). One possible way around this is a valid recoupment claim. DiStefano, 839 F. Supp. at 123. Another important consequence of applicability is the requirement to attempt administrative resolution before going to court. E.g., FDIC v. Cheng, 787 F. Supp. 625, 631 (N.D. Tex. 1991).

If the seemingly uniform application in the case of wholly owned corporations begins to break down with respect to mixed-ownership corporations, it breaks down even further for the government-sponsored enterprise. For example, the Federal Home Loan Mortgage Corporation ("Freddie Mac") has been held not a "federal agency" under the FTCA. Mendrala v. Crown Mortgage Co., 955 F.2d 1132 (7th Cir. 1992). However, it is not inconceivable that a court could construe the language of 28 U.S.C. § 2671 to encompass some GSEs.

The original definitional language, quoted in Wickman, 78 F. Supp. at 285 (emphasis added), "corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States," suggests an interesting twist.[197] At least in theory, it seems possible for a government corporation or GSE to be subject to the FTCA with respect to its primary function, but not subject while performing some ancillary or incidental function.

[197]The linguistic change resulting from the 1948 recodification of Title 28 presumably works no substantive change.

As to the remaining types of government-created corporations, applicability of the FTCA would seem quite remote. Earlier in our definitional discussion we noted cases refusing to apply the FTCA to the American Red Cross and to Production Credit Associations. And, the FTCA does not apply to Amtrak. Sentner v. Amtrak, 540 F. Supp. 557, 561 (D.N.J. 1982).

For most government corporations, applicability of the FTCA is determined under the definitional language of 28 U.S.C. § 2671. In a few instances, inclusion or exclusion is the subject of other specific legislation. For example, the Commodity Credit Corporation is subject to the FTCA by virtue of express language in 15 U.S.C. § 714b(c), although it is not clear why the CCC would not qualify under the definitional language in any event. The FTCA itself provides a few exemptions. Under 28 U.S.C. § 2680(n), the law does not apply to claims "arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

Another significant exemption is 28 U.S.C. § 2680(l): the FTCA does not apply to "[a]ny claim arising from the activities of the Tennessee Valley Authority." From this, it is clear that the FTCA cannot form the basis of a claim or suit against the TVA. E.g., Robinson v. United States, 422 F. Supp. 121 (M.D. Tenn. 1976); Latch v. TVA, 312 F. Supp. 1069 (N.D. Miss. 1970). However, the TVA still can be sued in tort under its "sue and be sued" clause. Courts have held that, subject to public policy limitations, it is "subject to common law liability and may be sued and held liable as may be a private individual." Brewer v. Sheco Construction Co., 327 F. Supp. 1017 (W.D. Ky. 1971); Smith v. TVA, 436 F. Supp. 151 (E.D. Tenn. 1977) (following Brewer). Well, maybe not exactly like a private individual because the TVA is an agency or instrumentality of the United States, and the Fifth Circuit has held that it cannot be held liable for punitive damages without statutory authority. Painter v. TVA, 476 F.2d 943 (5th Cir. 1973).

(3) Contract Disputes Act

The Contract Disputes Act, 41 U.S.C. §§ 601-13, applies to each "executive agency," which includes "a wholly owned Government corporation as defined by section 9101(3) of Title 31." 41 U.S.C. § 601(2). See APA, Inc. v. FSLIC., 562 F. Supp. 884 (W.D. La. 1983)

(Contract Disputes Act applied to former FSLIC because it was listed as a wholly owned government corporation).

As is often the case, the Tennessee Valley Authority has its own specific provisions. TVA contracts "for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system" are excluded from the CDA. 41 U.S.C. § 602(b). Other TVA contracts are covered only if they include a disputes clause mandating administrative resolution. 41 U.S.C. §602(b). The TVA is authorized to establish its own board of contract appeals, and has its own direct payment authority. 41 U.S.C. §§ 607(a)(2), 612(d).

(4) Assignment of Claims Act

The Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 15) does not explicitly define its applicability. Therefore, absent some charter provision resolving the issue, applicability has been determined through case law.

The first wave of cases involved the U.S. Emergency Fleet Corporation, which seems to have spent as much time litigating as shipping cargo. The Comptroller of the Treasury ruled in 1919 that the statute should apply whenever payment is to be made from appropriated funds, and therefore it was not necessary to determine whether claims against the Corporation were claims against the United States. 25 Comp. Dec. 701 (1919). The courts disagreed, however, and held that the Fleet Corporation, because of its distinct corporate entity, was not subject to the Act. Rhodes v. United States, 8 F. Supp. 124 (E.D.N.Y. 1934); Charles Nelson Co. v. United States, 11 F.2d 906 (W.D. Wash. 1926); Providence Engineering Corp. v. Downey Shipbuilding Corp., 3 F.2d 154 (E.D.N.Y. 1924).

What was distinct about the Fleet Corporation, although not spelled out in the cases cited, was that the Shipping Board, which had organized the Fleet Corporation under statutory authority, was authorized to sell Fleet Corporation stock to the public as long as the Shipping Board remained majority stockholder. See Act of September 7, 1916, ch. 451, § 11, 39 Stat. 728, 731. The Corporation had been organized "so that private parties could share stock ownership with the United States." Rainwater v. United States, 356 U.S. 590, 593 (1958). While this may never have actually happened,[198] the Corporation was, nevertheless, legally designed to be more of a mixed-ownership corporation. Accordingly, the Rainwater Court noted in another context that enactments dealing with corporations like the Fleet Corporation were "of little value" in assessing "wholly owned and closely controlled" government corporations. Id. at 593-594. (A cynic might say that is equally true for case law.)

Later cases involving wholly owned corporations tend to regard the Assignment of Claims Act as applicable. The court in Federal Ins. Co. v. Hardy, 222 F. Supp. 68 (E.D. Mo. 1963), found it applicable to the Federal Housing Administration. Other cases have applied the Assignment of Claims Act to the Tennessee Valley Authority (Sigmon Fuel Co. v. TVA, 709 F.2d 440 (6th Cir. 1983)), and the Export-Import Bank (Balfour Maclaine Int'l, Ltd. v. Hanson, 876 F. Supp. 52, 57 (S.D.N.Y. 1995)). See also In re Sunberg, 35 B.R. 777 (Bankr. S.D. Iowa 1983), aff'd, 729 F.2d 561 (8th Cir. 1984) (CCC).

It is also possible for a government corporation or GSE which qualifies as a "financing institution" to be the assignee of the proceeds of a contract between the contractor and some other government agency. For example, in Peoria Consolidated Manufacturers, Inc. v. United States, 286 F.2d 642 (7th Cir. 1961), the court noted that the plaintiff manufacturing company had obtained a loan from the Reconstruction Finance Corporation and, as security assigned, to the corporation money due under a contract with the Army. Id. at 644.

(5) Estoppel

The classic case on estoppel against the government, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), involved a wholly owned government corporation. The Corporation had denied a claim based on the eligibility criteria in its regulations. The Supreme Court upheld the denial, notwithstanding that the farmer had been misled into believing that his crop would be covered. Speaking through Justice Frankfurter, the Court explained:

[198] As of at least 1927, the Shipping Board still held all of the stock. See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 5 (1927).

"[W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. . . . The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. . . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Id. at 383-84.

The D.C. Circuit has held Freddie Mac—the Federal Home Loan Mortgage Corporation—to be a federal entity for purposes of a promissory estoppel claim. McCauley v. Thygerson, 732 F.2d 978 (D.C. Cir. 1984). (This was the pre-privatization version of Freddie Mac dealt with in Rocap v. Indiek, cited earlier in connection with the Freedom of Information Act.)

(6) Prompt Payment Act

The Prompt Payment Act, 31 U.S.C. §§ 3901-3907, requires the payment of an "interest penalty" when an agency makes late payment for the acquisition of property or services from a business concern. The definition of "agency" in 31 U.S.C. § 3901(a) adopts the definition of the Administrative Procedure Act, 5 U.S.C. § 551(1), which is broad enough to include government corporations but does not explicitly apply to them. GAO has regarded this language as clearly applying, for example, to the Commodity Credit Corporation. B-223857, February 27, 1987. Subsection (b) of 31 U.S.C. § 3901 states that the Act applies to the Tennessee Valley Authority, but that "regulations prescribed under this chapter do not apply" to the TVA, which is authorized to prescribe its own implementing regulations.

Congress amended the Act in 1988 to make it applicable to certain assistance payments to farmers by the Commodity Credit Corporation (CCC) which are not payments for the acquisition of goods or services. 31 U.S.C. § 3902(h). Under 31 U.S.C. § 3907, a claim for an interest penalty may be brought under the Contract Disputes Act but, since that act has its own interest provision, Prompt Payment Act interest is limited to one year. However, by virtue of 31 U.S.C. § 3902(h)(4), section 3907 does not apply to payments owed by the CCC for agricultural commodity pricing and disaster assistance programs. Therefore, the one-year limitation on interest payments does not apply to those payments. Doane v. Espy, 873 F. Supp. 1277 (W.D. Wis. 1995). As with any other statute, and subject, of course, to constitutional restrictions, Congress can expand or restrict the scope or applicability of 31 U.S.C. § 3902(h). See Huntsman Farms, Inc. v. Espy, 928 F. Supp. 1451 (E.D. Ark. 1996), for one example.

(7) False Claims Act

The False Claims Act, 31 U.S.C. §§ 3729-3731, imposes liability for presenting a false claim to, or conspiring to defraud, "the Government." 31 U.S.C. § 3729(a). The question in the present context is whether defrauding a government corporation is the same as defrauding "the Government" for False Claims Act purposes. With respect to wholly owned corporations at least, the answer appears to be "yes."

One line of cases involves the Commodity Credit Corporation (CCC). The Supreme Court has held that a claim against the CCC is a claim against the government under the False Claims Act. Rainwater v. United States, 356 U.S. 590 (1958). See also United States v. McNinch, 356 U.S. 595 (1958); United States v. Brown, 274 F.2d 107 (4th Cir. 1960). As the Rainwater Court put it:

> "In brief, Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds.
>
> "In our judgment Commodity is a part of 'the Government of the United States' for purposes of the False Claims Act." 356 U.S. at 592.

Another line of cases says essentially the same thing with respect to the Federal Housing Administration. McNinch, 356 U.S. at 598; United States v. Veneziale, 268 F.2d 504 (3d Cir. 1959); United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1960). However, the McNinch Court held that a lending institution's application for credit insurance from the FHA is not a "claim" under the False Claims Act. 356 U.S. at 598.

Other wholly owned corporations which have been regarded as part of "the Government" under the False Claims Act include the Federal Crop Insurance Corporation (Kelsoe v. Federal Crop Insurance Corp., 724 F. Supp. 448 (E.D. Tex. 1988)), and the former Reconstruction Finance Corporation (United States v. Borin, 209 F.2d 145 (5th Cir. 1954)). Whether there might be any basis for distinguishing these corporations from any other wholly owned corporations does not appear to have been addressed.

The Federal Deposit Insurance Corporation—a mixed-ownership government corporation—has also been treated as part of the government under the False Claims Act. United States ex rel. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87 (D. Maine 1996), motion for reconsideration denied, 962 F. Supp. 206 (D. Maine 1997). This case involved the so-called "reverse claim" provision of the False Claims Act, 31 U.S.C. § 3729(a)(7), imposing liability for knowingly making or using a false record or statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

(8) Interagency claims

The conventional wisdom has traditionally been that an agency of the federal government may not sue the United States or another agency because the same person may not be on both ends of the same lawsuit. E.g., Defense Supplies Corporation v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945). Based in part on this reasoning, GAO had held that an agency's appropriations were not available to pay a claim for damage to the property of a government corporation. 25 Comp. Gen. 49 (1945). This was a straightforward application of the so-called "interdepartmental waiver doctrine" discussed in Chapter 12. However, the "unitary" theory, while still true for the most part, is not an absolute. See, e.g., United States v. ICC, 337 U.S. 426 (1949); Dean v. Herrington, 668 F. Supp. 646 (E.D. Tenn. 1987) (suit by TVA against DOE).

More recent decisions have recognized the availability of an agency's appropriations to pay damage claims to at least certain government corporations and corporate-like entities. For example, the Bonneville Power Administration could charge the National Weather Service for damage resulting from its use of Bonneville property. 71 Comp. Gen. 1 (1991). Under Bonneville's financing structure, the burden otherwise would have fallen on Bonneville's customers through rate increases caused by unrelated activities. Id. at 3-4. The Bonneville decision was followed and applied in B-253613, December 3, 1993, holding that the Federal Highway Administration could pay the Tennessee Valley Authority for damage its construction caused to TVA's electrical transmission towers because the burden would otherwise have fallen on TVA's customers.

The reverse situation—payment by a government corporation to another agency—occurred in 26 Comp. Gen. 235 (1946). GAO concluded that the corporation could pay the claim as long as its funds were available for the payment of damages incurred in the course of its operations. In the cited case, the funds of the former Inland Waterways Corporation were available to operate the business of a common carrier by water, and therefore available to pay any lawful claims arising from that activity. The claimant in the 1946 case happened to be another government corporation. Either way, the fact that the agency or corporation suffering the damage may not have a legally enforceable claim does not prevent administrative settlement. Of course, the charter power to make final and conclusive claim settlements provides this authority too.

b. Debt Collection

In Chapter 13 of this publication we demonstrate, that the United States has inherent authority to recover amounts owed to it and does not need any special statutory authority to do so. There is no apparent reason this should not apply equally to government corporations. See Bechtel v. Pension Benefit Guaranty Corporation, 624 F. Supp. 590 (D.D.C. 1984), aff'd, 781 F.2d 906 (D.C. Cir. 1986).

The typical claims settlement charter provision of government corporations applies to debt claims as well as payment claims. For example, 15 U.S.C. § 714b(k) authorizes the Commodity Credit Corporation to "make final and conclusive settlement and adjustment of any claims by or against the Corporation." Just as with payment claims, this authority removes the corporation from the coverage of 31 U.S.C. § 3702(a), the general claims settlement statute. Since most debt collection became statutory during the last third of the 20th century, this has less significance than it does in the payment context.

Much of the governmentwide debt collection legislation applies expressly to government corporations, which, in the absence of authority to the contrary, we would assume should be interpreted to mean the corporations listed in 31 U.S.C. § 9101. The first governmentwide statute, the Federal Claims Collection Act of 1966, defined "agency" as including government corporations. Pub. L. No. 89-508, § 2(a), 80 Stat. 308. The provisions which originated in the 1966 Act are the duty to pursue collection action and the compromise, suspension, and termination authorities, all of which are now found in 31 U.S.C. § 3711. The Debt Collection Act of 1982

(Pub. L. No. 97-365, 96 Stat. 1749) did not include its own definition, but many of its provisions were cast as amendments to the Federal Claims Collection Act, such as sections 10 (31 U.S.C. § 3716, administrative offset), 11 (31 U.S.C. § 3717, interest), and 13 (31 U.S.C. § 3718, contracts for collection services). Thus, these became subject to the 1966 definition.

The 1982 recodification of Title 31 dropped the definition as unnecessary. While this made no substantive change, it then required several steps of statutory construction to figure out which provisions applied to government corporations. In 1996, as part of the Debt Collection Improvement Act of 1996, the express reference to government corporations was restored. 31 U.S.C. § 3701(a)(4), as amended by Pub. L. No. 104-134, § 31001(c)(2), 110 Stat. 1321, 1321-359. Thus, for example, the Pension Benefit Guaranty Corporation is subject to 31 U.S.C. § 3718 and may contract for collection services to collect delinquent debts, but not for audit services to identify the debts. B-276628, August 19, 1998.

One authority a government corporation has which a regular agency does not (by virtue of either its specific claims settlement power or its sue-and-be-sued power, in conjunction with other charter powers) is the authority to waive indebtedness, independent of the waiver statutes applicable to the rest of the government. B-194628, July 3, 1979 (Government National Mortgage Association); B-190806, April 13, 1978 (Pension Benefit Guaranty Corporation). The power to waive includes the power to rescind a previously granted waiver if found to have been obtained under a material mistake of fact, error of law, fraud, or misrepresentation. B-272467.2, August 28, 1998 (Export-Import Bank).

In the majority of cases in which the fact that a government corporation is involved is relevant, the issue is whether a debt owed to the corporation is the same as a debt owed to the United States. The largest group of cases involves 31 U.S.C. § 3713, which gives priority to government claims under certain circumstances, and the earliest of these dealt with the Emergency Fleet Corporation. The courts held that debts owed to the Fleet Corporation were not entitled to the statutory priority. Sloan Shipyards Corp. v. United

States Shipping Board Emergency Fleet Corp., 258 U.S. 549 (1922);[199] United States v. Wood, 290 F. 109 (2d Cir. 1923), aff'd mem. 263 U.S. 680; West Virginia Rail Co. v. Jewett Bigelow & Brooks Co., 26 F.2d 503 (E.D. Ky. 1928).

As we have seen (under the Assignment of Claims Act heading above), Fleet Corporation cases must be applied with great caution, but this is one instance in which the courts have generally reached the same result. Debts to the following corporations have been held not to constitute debts to the United States for purposes of the priority statute: Government National Mortgage Association or "Ginnie Mae" (United States v. Blumenfeld, 128 B.R. 918 (E.D. Penn. 1991)); Federal Deposit Insurance Corporation (Lapadula & Villani, Inc. v. United States, 563 F. Supp. 782 (S.D.N.Y. 1983)); and the former Reconstruction Finance Corporation (RFC) (RFC v. Brady, 150 S.W.2d 357 (Tex. Civ. App. 1941)). Two cases giving priority to RFC debts are In re Peoria Consol. Mfrs., Inc., 286 F.2d 642 (7th Cir. 1961), and In re Tennessee Cent. Ry., 463 F.2d 73 (6th Cir. 1972). Peoria involved a loan program given to the RFC under the Defense Production Act of 1950, the funds for which "were obtained from the Treasury of the United States and did not involve the capital or assets of RFC." 286 F.2d at 645. The Tennessee litigation occurred long after the RFC had been liquidated and its assets transferred to various government agencies. See RFC Liquidation Act, Pub. L. No. 83-163, 67 Stat. 230 (1953).

Since the fact of corporate identity seems to be the key factor in these cases, the courts have reached a different result with respect to the Federal Housing Administration, which has corporate powers but is not organized as a corporation. Debts owed to the FHA are debts owed to the United States under 31 U.S.C. § 3713. Korman v. Federal Housing Administrator, 113 F.2d 743 (D.C. Cir. 1940); In re Byquist, 168 F. Supp. 483 (D. Kan. 1958). Also, Congress can extend the government's priority to any government corporation by expressly so providing in the charter, as it has done, for example, for the Commodity Credit Corporation. 15 U.S.C. § 714b(e). See Engleman v. CCC, 107 F. Supp. 930 (S.D. Cal. 1952) (recognizing the

[199]The summary treatment in Sloan, 258 U.S. at 570, did not cite the priority statute but the lower court opinion, which Sloan affirmed, did. See In re Eastern Shore Shipbuilding Corp., 274 F. 893 (2d Cir. 1921).

priority but finding the statute inapplicable where the government acquired its claim after an assignment for the benefit of creditors).

In the area of offset, GAO and the courts have mostly recognized the "unitary government" concept and treated debts to government corporations as debts to the United States. Applying the common-law offset inherent under the general settlement authority of 31 U.S.C. § 3702(a), GAO took the position that a refund of certain taxes was subject to offset to collect a debt owed to the Reconstruction Finance Corporation. B-35182, August 16, 1943. The debtor sued, the government filed a counterclaim, and the Supreme Court effectively upheld the offset. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946). The Court said:

> "Every reason that could have prompted Congress to authorize the Government to plead counterclaims for debts owed to any of its other agencies applies with equal force to debts owed to the R.F.C. . . . That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." Id. at 539.

While the Court was ruling, strictly speaking, on the propriety of the counterclaim and not the propriety of the administrative action, the rationale clearly fits. See also B-35182, November 30, 1945. While there now exists a comprehensive statutory provision for administrative offset, 31 U.S.C. § 3716, which applies to government corporations, the common-law principles remain relevant in cases in which section 3716 does not apply. Just like any non-corporate agency, a government corporation cannot use 31 U.S.C. § 3716 unless it has issued implementing regulations. In re Art Metal U.S.A., Inc., 109 B.R. 74, 81 (Bankr. D.N.J. 1989).

The "unitary government" concept also applies for the most part in setoffs under the Bankruptcy Code. E.g., In re Turner, 84 F.3d 1294 (10th Cir. 1996). The bankruptcy law, 11 U.S.C. § 553, preserves any common-law offset arising before commencement of the bankruptcy case. For purposes of this provision, most government corporations are part of the "unitary" government. This had also been the case under prior versions of the Bankruptcy Code. Luther v. United States, 225 F.2d 495 (10th Cir. 1954); B-120801, July 7, 1955. There is an exception, however, for "certain federal agencies such as the Federal Deposit Insurance Corporation [which] are viewed as separate governmental units when they act in their private receivership capacity." Doe v. United States, 58 F.3d 494, 498 (9th Cir. 1995); In re Lopes, 211 B.R. 443, 447 n.3 (D.R.I. 1997). Another exception which fits this formulation is the Pension Benefit Guaranty Corporation when serving as trustee for terminated plans. The fact that the Pension Benefit Guaranty Corporation is a wholly owned government corporation had no impact on the court's decision. In re Art Metal U.S.A., Inc., 109 B.R. at 78.

In one early case predating Cherry Cotton Mills, GAO applied the precedents under the priority statute in determining which debts can be collected by offset against judgments under 31 U.S.C. § 3728. A-97085, June 13, 1942, holding that a debt owed to the Federal Deposit Insurance Corporation was not a debt owed to the United States for judgment offset purposes. While the result might still be the same for the corporation under the "private capacity" exception, the analysis probably should start by applying the offset cases rather than the priority cases.

c. Litigation in the Courts

(1) Sovereign immunity

We begin with the well-recognized principle that sovereign immunity protects the Federal Government and its agencies from suit. E.g., FDIC v. Meyer, 510 U.S. 471, 475 (1994). Of course, the United States may waive that immunity by consenting to be sued. The Supreme Court in Meyer described sovereign immunity as being jurisdictional in nature—"the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." Id. at 475, quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Since government corporations are not always considered to "be" the United States, we cannot rely solely upon the general theories of sovereign immunity to determine the status of government corporations.

(2) Sue-and-be-sued clauses

Most government corporation charters provide the power to sue and be sued; that is, sue and be sued in the name of the corporation rather than the United States. The simplest charter provision empowers the corporation to "sue and be sued in its corporate name." E.g., 16 U.S.C. § 831c (b) (TVA); 7 U.S.C. § 942 (Rural Telephone Bank). A variation includes one or two additional elements, such as 29 U.S.C. § 1302(b)(1), which authorizes the

Pension Benefit Guaranty Corporation to "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." Another version adds a whole paragraph of instructions on such things as jurisdiction, venue, and garnishment. E.g., 15 U.S.C. § 714b(c) (CCC).

The litigative status of a government corporation without a sue-and-be-sued clause is open to some debate. In Keifer & Keifer v. RFC, 306 U.S. 381, 389 (1939), the Supreme Court said that the mere fact that corporations are created by Congress and act as agencies of the United States "would not confer on such corporations legal immunity even if the conventional sue-and-be-sued clause were omitted." Other courts seized upon this proposition and proclaimed that a government corporation does not share the government's sovereign immunity unless Congress expressly grants it. E.g., RFC v. Langham, 208 F.2d 556 (6th Cir. 1953); United States v Edgerton & Sons, 178 F.2d 763 (2d Cir. 1949). Taken to its logical conclusion, this position would render the sue-and-be-sued clause surplusage—the situation would be the same with or without it. In Keifer, however, the Court was dealing with legislation which authorized the RFC to create certain regional corporations, and found that Congress contemplated that the powers of the parent corporation would flow through to its progeny. Many government corporations have come and gone in the decades since the Keifer decision, virtually all possessing the sue-and-be-sued power, and it would seem that the omission of that power from a new statutory charter could not be summarily dismissed. Be that as it may, the question would likely turn on congressional intent (Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935)) and may well remain academic as Congress seems to include the clause almost automatically.

Regardless of the arguable consequences of silence in a legislative charter, the important starting principle is that Congress has the power to control the matter by including appropriate language, one way or the other, in the charter. As the Supreme Court put it in FHA v. Burr, 309 U.S. 242, 244 (1940):

> "[T]here can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."

A very similar statement is found in Priddy, 295 U.S. at 231. "Immunity from suit is . . . given up when the language of the organic statute specifically waives it." Dollar v. Land, 154 F.2d 307, 312 (D.C. Cir. 1946), aff'd, 330 U.S. 731 (1947). The most common legislative device for doing this is the sue-and-be-sued clause. The Supreme Court emphasized in Meyer that sue-and-be-sued clauses could only be limited by implication in certain circumstances where there has been a:

"clea[r] show[ing] that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow fashion." 309 U.S. at 245, quoting Burr, 510 U.S. at 480.

The fact that a government corporation can sue or be sued does not mean that it can be hauled into court for any perceived wrong. The Supreme Court pointed out in Meyer that the sovereign immunity waiver is only the first step in a two-step process.

"The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." Id. at 484.

The Meyer Court held that the sue-and-be-sued clause of the former Federal Savings and Loan Insurance Corporation waived its immunity with respect to a constitutional tort claim, but that there was no legal basis—and the Court emphatically refused to create one—for asserting a constitutional tort claim against the agency itself. Thus, a sue-and-be-sued clause does not furnish the legal basis for the suit. See also Young v. FDIC, 763 F. Supp. 485 (D. Colo. 1991); Atchley v. TVA 69 F. Supp. 952 (N.D. Ala. 1947); Grant v. TVA, 49 F. Supp. 564 (E.D. Tenn. 1942). The Atchley court put it this way:

"A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist." 69 F. Supp. at 954.

Some conflict has arisen regarding the source of payments for potential judgments and the effect, if any, on jurisdiction. The source of that conflict can be found in the Burr case. In Burr, the Supreme Court held that garnishment was available to litigants against FHA, but stated that this did not mean "that any funds or property of the United States can be held responsible for this judgment." 309 U.S. at 250. The Supreme Court pointed out that claims against private corporations are normally only collectible against corporate assets and that the same was true for the FHA. The National Housing Act directed that claims against the FHA involved in this case "shall be paid out of funds made available by this Act." Id. at 250. Thus, the Supreme Court concluded that only funds which were actually in the possession of FHA, "severed from Treasury funds and Treasury control, are subject to execution." Id. On the other hand, FHA funds deposited with the Treasury were not subject to execution because there had been no consent to reach them and allowing execution "would be to allow proceedings against the United States where it had not waived its immunity." Id. Recognizing that this restriction on execution deprived it of utility, the Supreme Court emphasized that this was an inherent limitation on the statutory scheme and remedies provided by Congress.

Courts have differed in interpreting the Burr holding. Some courts have held that, in order to establish the government's waiver of sovereign immunity, the party suing a government corporation with a sue-and-be-sued clause must show that a judgment against the government corporation would come from funds in its possession and control. Johnson v. Secretary of HUD, 710 F.2d 1130, 1138 (1983); S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 36 (1979); Thomas v. Pierce, 662 F. Supp. 519, 526 (1987); Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co., 595 F.2d 1126 (1979). See also, Oklahoma Mrtg. Co. v. GNMA, 831 F. Supp. 821 (1993) (GNMA has no funds in its possession and control separate from Treasury funds, and statute precludes recovery from its assets, so claims against it were, in reality, claims against the United States barred by sovereign immunity).

Some courts have rejected this approach reasoning that those cases misinterpret Burr. Auction Co. v. FDIC, 132 F.3d 746 (1997) (Auction I). In deciding jurisdictional issues involving the FDIC, the Auction I court criticized the distinction between suits against agencies and those against the United States because "this test was designed to distinguish suits against private individuals from ones against the sovereign," and "[f]ederal agencies or instrumentalities performing federal functions always fall on the 'sovereign' side of the fault line; that is why they possess immunity that requires waiver." Id. at 752.

The Auction I court stated that although the source of funds for recovery may become an issue, "it is not jurisdictional and does not bear on whether a suit against the FDIC as Receiver is a suit against the United States." Id. at 752-753.

Other courts have held that when sovereign immunity is waived by a sue-and-be-sued clause, the court does not need to analyze whether there are funds within the government corporation's control for jurisdictional purposes. C.H. Sanders Co. v BHAP Housing Development Fund, 903 F.2d 114, 120 (1990); Jackson Square Assoc. v. HUD, 797 F. Supp. 242, 245-246 (1992). Upon consideration of the Government's petition for rehearing in the C.H. Sanders case, the Second Circuit addressed the concern that HUD was obliged to satisfy any judgment that might be rendered out of Treasury funds. C.H. Sanders Co. v BHAP Housing Development Fund, 910 F.2d 33 (1990) (denying petition for rehearing). The Second Circuit held that HUD would be obliged to satisfy any judgment only out of non-Treasury funds that are available to it and would have no payment obligation if no such funds were available. Id.

Another court distinguished Burr on the basis that jurisdiction was derived from another source, such as the Tucker Act which does not limit the source of judgment, instead of the FHA's sue-and-be-sued clause. National State Bank of Newark v. United States, 357 F.2d 704, 711 (1966).

Finally, the court in Far West Federal Bank v. OTS, 930 F.2d 883, 890 (1991), recognized the split, but avoided choosing one or the other because it was able to identify funds in control of the government corporation from which any judgments would be paid. In Far West, the government argued that any judgment would be paid from Treasury funds and not funds in control of the government corporation and such a claim could only be asserted in the Claims Court under the Tucker Act. The government's argument was based upon a "Treasury backup" provision stating that the Secretary of Treasury will fund amounts as may be necessary for fund purposes. However, the court held that the liabilities of the fund were to be paid from the fund, the fund was to be administered by the government corporation and the "Treasury backup" provision simply implemented congressional intent that the fund have sufficient resources to carry out its obligations. Id. at 889-890. Thus, the court concluded that the "Treasury backup" provision did not bar recovery under the sue-and-be-sued clause or impose exclusive Tucker Act jurisdiction.

Notwithstanding the differences discussed above, generally, judgments against a government corporation are paid by the government corporation rather than from the "judgment fund" discussed in Chapter 14.[200] As explained in that chapter, judgments against government corporations are "otherwise provided for". When judgments are obtained against government corporations they can pay them, like private corporations, from those corporate assets. Both GAO and the Attorney General recognize this rule. See, e.g., 13 Op. Off. Legal Counsel 362 (1989); 62 Comp. Gen. 12 (1982).

(3) The Tucker Act

Sue-and-be-sued clauses are not the only waivers of sovereign immunity for government corporations. The Tucker Act waives sovereign immunity of the United States and sets out jurisdictional parameters for certain monetary claims against the United States, including those founded upon the Constitution, any act of Congress, any regulation of an executive department, or any express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction for suits of more than $10,000 and concurrent jurisdiction with federal district courts for suits not exceeding $10,000. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1). The Tucker Act provides jurisdiction for suits against the United States whenever "a federal instrumentality acts within its statutory authority to carry out [the government's] purposes" as long as no other specific statutory provision bars jurisdiction. Auction Co. of America v. FDIC, 141 F.3d 1198, 1199 (1998) (Auction II). Several mixed-ownership government corporations, such as the FDIC as receiver, the Office of Thrift Supervision, and the Resolution Trust Corporation have been held to be federal instrumentalities for Tucker Act purposes. Auction I, 132 F.3d at 750; Auction II, 141 F.3d

[200]Under section 1304 of title 31, a permanent appropriation, commonly known as the "Judgment Fund," was created to pay judgments against the United States when, among other things, "the payment is not otherwise provided for." If an appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment, then the judgment appropriation may not be used. See, e.g., 62 Comp. Gen. 12 (1982).

at 1199. See, e,g,, Slattery v. United States, 35 Fed. Cl. 180 (1996); Seuss v. United States, 33 Fed. Cl. 89 (1995).

A wholly-owned government corporation is clearly a federal instrumentality for Tucker Act purposes where it can be demonstrated that it is “an agency selected by the Government to accomplish purely Governmental purposes . . . and that it is doing work of the Government.” Breitbeck v. United States, 500 F.2d 556, 558 (1974) (Saint Lawrence Seaway Development Corporation); See also, Oklahoma Mrtg. Co. v. GNMA, 831 F. Supp. 821 (1993) (company’s claim was an action founded upon a contract, against the United States, seeking relief in excess of $10,000 which was within the exclusive jurisdiction of the United States Claims Court). Even where wholly owned government corporations carry out commercial activities that can be characterized as private, if their purpose is to further the policy interests of the government, they are considered to be federal instrumentalities for Tucker Act purposes. Optiperu, S.A., v. OPIC, 640 F. Supp. 420, 424 (1986). The Optiperu court reviewed the legislative history of OPIC and found several instances where Congress set out its governmental policy objectives while carrying out transactions that would otherwise normally be characterized as private, such as issuing and guaranteeing loans and insurance. The court noted that OPIC is “an agency of the United States under the policy guidance of the Secretary of State.” 22 U.S.C. § 2191. The court also pointed out that OPIC was listed as a wholly owned government corporation in the Government Corporation Control Act, 31 U.S.C. § 9101(3)(H), and noted the various provisions dealing with OPIC’s budget submissions, appropriations, financial audits and account requirements with the Government. 640 F. Supp. at 424 n.2. Finally, the court found that even if OPIC had to pay any judgments out of its funds rather than the Treasury, this did not eliminate its status as a federal instrumentality. Id. at 425-426. Rather, the United States would be jointly or severally liable for any money damages obtained against OPIC. Id.

The various waivers of sovereign immunity and jurisdiction al authority may provide plaintiffs with several choices of forum. For example, in Auction I, 132 F.3d at 753, the court pointed out that plaintiffs suing the FDIC in contract could sue in the Court of Federal Claims for Tucker Act suits of more than $10,000, in the Court of Federal Claims or federal district court for Tucker Act claims of less than $10,000 or in any court of law or equity under the FDIC sue-or-be-sued clause.

(4) Liability for Costs and Remedies of Litigation

Once government corporations sue, or are sued, they can expect to be subject to at least some of the typical costs of litigation. Courts have analyzed the sue-and-be-sued clauses of government corporations in order to determine which costs can be assessed against government corporations. In Burr, 309 U.S. 242, for example, the Supreme Court held that the Federal Housing Administration was subject to all civil process incident to the commencement or continuance of legal proceedings which included the garnishment of the wages of an FHA employee sought in that case. The Supreme Court noted that garnishment is a well-known remedy available to litigants and "[t]o say that Congress did not intend to include such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." Burr, 309 U.S.at 246. The Court pointed out two examples of government agencies with sue-and-be-sued clauses with specific prohibitions against attachment and garnishment, which added weight to the Court's conclusion that Congress ordinarily intended that such civil process apply or it would have specifically prohibited them 309 U.S. at 247 n.10.

The Supreme Court considered whether the Reconstruction Finance Corporation (RFC), as the unsuccessful litigant, could be held liable for costs incident to litigation. RFC v. Menihan Corp., 312 U.S. 81 (1941). The Supreme Court noted that although the RFC acted as a governmental agency "its transactions are akin to those of private enterprises" and Congress provided it with the power to sue-and-be-sued. Id. at 83. The Supreme Court held that sue-and-be-sued clauses "normally include the natural and appropriate incidents of legal proceedings" and that the "payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident." Id. at 85. Although this statement was very broad, its application has been somewhat limited.

Generally, interest cannot be recovered in a suit against the United States unless there is an express waiver of sovereign immunity from an award of interest. Library of Congress v. Shaw, 478 U.S. 310 (1986). Where a government corporation does not act like a private corporation, but acts as an agent for the Government and there is no statute or authority for paying interest, interest cannot be imposed upon the United States directly or indirectly through the agent government corporation. Riverview Packing Co. v. RFC, 207 F.2d 361, 370 (1953).

However, interest can and has been recovered against government corporations under certain circumstances. As discussed in Chapter 14, a "commercial venture" exception to the no-interest rule has developed. Generally this exception recognizes that where an agency of the United States is involved in an essentially commercial and for–profit venture, its sue-and-be-sued clause waives sovereign immunity and may allow liability for pre- or post-judgment interest. Standard Oil Co. of New Jersey v. United States, 267 U.S. 76 (1925); R&R Farm Enterprises v. FCIP, 788 F.2d 1148 (1986). If the party seeking payment of interest is a recipient of government benefits arising out of the agency's noncommercial ventures, courts have refused to award interest because the payment would be in excess of what Congress or the agency have authorized by law or regulation. R&R Farm Enterprises 788 F.2d at 1153. See also, McGhee v. Panama Canal Commission, 872 F.2d 1213 (1989); Pender Peanut Corp.v United States, 21 Cl. Ct. 95 (1990). Those courts held that the waiver of sovereign immunity does not create a new liability upon the government for the payment of interest.

In cases where the government corporation is not engaged in a commercial enterprise, but is acting as a governmental, regulatory entity, it is not subject to prejudgment interest awards even where it has a sue-and be-sued clause. For example, where the FDIC is acting as a regulatory agency protecting the banking system, it is not subject to prejudgment interest awards. Far West Federal Bank v. OTS, 119 F.3d 1358, 1366 (1994); Spawn v. Western Bank-Westheimer, 989 F.2d 830, 833-38 (1993); Gilbert v. FDIC, 950 F. Supp. 1194 (1997).

The award of prejudgment interest may also be imposed against government corporations under the analysis recognized by the Supreme Court in Loeffler v. Frank, 486 U.S. 549, 556 (1988). Under title VII of the Civil rights Act of 1964, Congress waived sovereign immunity for actions against federal agencies, but not for interest awards. Library of Congress v. Shaw, 478 U.S. at 323. In Loeffler, the Supreme Court identified two factors which waived any existing immunity of the Postal Service.[201] First, the Supreme Court recognized that Congress had designed the Postal Service to be run like a business by "launching" it into the commercial world. Loeffler, 486 U.S. at 556. Second, Congress included a sue-and-be-sued clause in the Postal Service's charter. Id. However, since Congress did not expressly limit the waiver of sovereign immunity effected by the Postal Service's sue-and-be-sued clause, interest could be recovered against the Postal Service in title VII cases even though it could not be recovered against other agencies. The Supreme Court concluded that "Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards" which could be recovered from the Postal Service "to the extent interest is recoverable against a private party as a normal incident of suit." Id. at 556-57.

Finally, like federal agencies, government corporations may not be sued for punitive damages unless expressly authorized by Congress. Springer v. Bryant, 897 f.2d 1085, 1089 (1990).

The Equal Access to Justice Act (EAJA) also authorizes fee awards against the United States, in various administrative and judicial actions which were not previously authorized. See also 63 Comp. Gen. 260, 261 (1984). Prior to the EAJA's implementation, the award of attorney's fees against the government was barred and a sue-and-be-sued clause that did not directly or expressly authorize an award of fees was not sufficient to override that bar. RTC v. Miramon, 935 F. Supp. 838, 842 (1996).

The EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412.[202] Id. Section 2412 applies to the United States or "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(c)(2). The EAJA has been applied to both mixed-ownership and wholly owned government

[201]The United States Postal Service is an independent establishment of the executive branch. 39 U.S.C. § 201. However, it shares many characteristics of government corporations including commercial or business-type operations and a sue-and-be-sued clause.

[202]These provisions are discussed in detail in Chapter 14.

corporations, although without addressing the issue of the EAJA's application to them. See, e,g., RTC v. Eason, 17 F.3d 1126 (1994); RTC v. Miramon, 935 F. Supp. 838 (1996); Olenhouse v. CCC, 922 F. Supp. 489 (1996).

As with other federal agencies, the EAJA operates as a limited waiver of a government corporation's sovereign immunity by permitting courts to award reasonably attorneys' fees to prevailing parties under common law or the terms of a statute, but the waiver must be strictly construed in favor of the government. Eason, 17 F.3d at 1134. In that case, the RTC sued officers of a failed savings and loan association alleging negligence and breach of fiduciary duty. The officers successfully defended against the action and attempted to recover attorney's fees from the RTC relying on a regulation that authorized indemnification for expenses incurred in defending charges arising out of their official conduct. However, that regulation only applied during the "life" of the savings and loan. By the time the RTC brought the action, the entity had failed and the RTC was not deemed to be acting in the capacity of the savings and loan. Thus, the regulation did not apply and the officers could not recover attorney's fees.

The EAJA is specific in the items that may be awarded in a judgment against the United States for costs, fees and expenses, and does not authorize general compensatory damages for embarrassment or loss of reputation. Miramon, 935 F. Supp. at 844. Neither does a "naked" sue-and-be-sued clause, that is, one which does not directly or expressly authorize an award of fees. Id. at 843.

Finally, the terms "common law" and "statute" as used in the EAJA's authorization of fees refers to federal common law or a federal statute, not state law. Eason, 17 F.3d at 1134 n.6; Miramon, 935 F. Supp. at 846.

(5) Sovereign Immunity from State and Local Taxes

The oft-quoted principle that the federal government and its activities[203] are immune from taxation by state and local governments was recognized by the Supreme Court in a case involving a government corporation. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).[204] The application of this principle to government corporations has varied since M'Culloch, but the main debate has centered on whether one should assume that an entity has such immunity due to its status as a corporation carrying out governmental purposes, or whether Congress must expressly grant such immunity by statute.

M'Culloch involved the Second Bank of the United States, which was chartered by Congress, had 20 percent of its capital stock subscribed to by the United States, and several of its directors appointed by the President. The Second Bank of the United States established a branch in Maryland. Maryland imposed a tax on all banks or branches of banks in the state which were not chartered by the Maryland state legislature. The Supreme Court held that the Supremacy Clause of the Constitution prevents a state from exercising any power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the federal government or its constitutional means of carrying out its powers. 17 U.S. at 436. The Supreme Court emphasized that the bank's purpose was to carry out a governmental function, and concluded that any effort to tax the bank directly affected the Government. The Supreme Court put it this way,

"[b]ut this is a tax on the operations of the bank, and is consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." 17 U.S. at 436-37.

Although the act creating the Bank did not expressly prohibit the states from taxing it, the Supreme Court in M'Culloch did not

[203]A federal instrumentality is also immune from state and local taxation if it is "so assimilated by the Government as to become one of its constituent parts." United States v. Township of Muskegon, 355 U.S. 484, 486 (1958). The Supreme Court has added that tax immunity for a federal instrumentality is appropriate when the agency or instrumentality is so closely connected to the government that the two cannot be realistically viewed as separate entities, as least insofar as the activity being taxed is concerned. United States v. New Mexico, 455 U.S. 720, 735 (1982).

[204]The United States' immunity from state and local taxation is discussed in Chapter 4.

address that issue. Five years later, the Supreme Court took up this issue in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In Osborn, the Supreme Court held that although Congress did not expressly prohibit taxing the Bank, immunity was implied as a consequence of Congress' power to create and protect the Bank. Id. at 865.

In later cases, the Supreme Court addressed Congress' power to exempt government corporations from state taxation without relying upon the "implied" immunity of the M'Culloch and Osborn cases. Smith v. Kansas City Title & Trust, 255 U.S. 180 (1920); Federal Land Bank v. Crosland, 261 U.S. 374 (1923). In those cases, Congress created government corporations—federal land banks—and specifically exempted their bonds and mortgages from state and local taxation. The Supreme Court held that Congress not only had the power to create the corporations, but to protect their operations by exempting them from taxation. 255 U.S. at 211-212; 261 U.S. at 377. A few months after it decided Crosland, the Supreme Court returned to the M'Culloch analysis in a case involving state taxation of another government corporation, the Spruce Production Corporation. Clallam County v. United States, 263 U.S. 341 (1923). In the words of the Supreme Court,

> "It is true that no specific words forbid the tax, but the prohibition established by M'Culloch v. Maryland . . . was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. . . . The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words." Id. at 344, quoting M'Culloch, 17 U.S. (4 Wheat.) at 425, 426, 430.

A statement by the Clallam court provides a clue as to what appears to be the distinction between these approaches. The Supreme Court noted that, unlike "the case of a corporation having its own purposes, as well as those of the United States and interested in profit on its own account," the Spruce Production Corporation was incorporated only for the convenience of the United States to carry out its ends. Clallam, 263 U.S. at 345. Although not addressed in either the Kansas City Title & Trust or Crosland cases, the federal land banks were mixed-ownership government corporations with private (read profit), as well as government purposes. See also Federal Land Bank v. Priddy, 295 U.S. 229, 234-235 (1935) (noting that Congress provided a specific grant of immunity from taxation to a corporation having its own, as well as government purposes).

Subsequent decisions by the Supreme Court continued this analysis. For example, recognizing that Congress may grant immunity from state and local taxation to a federal instrumentality or government corporation in Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939), the Supreme Court explained that "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations validly authorized." Id. at 32-33.[205] The Supreme Court held that the creation of the corporation "was a constitutional exercise of congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functionsand as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments." Id. at 32. See also Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95 (1941) (statutory exemption from taxation for federal land banks includes sales taxes).

As seen in the cases discussed above, Congress has specifically prescribed the scope of immunity for many government corporations by wholly or partially exempting them from state and local taxation.[206] In other instances, Congress expressly waived immunity from taxation of any real property belonging to a government corporation. For example, under the provisions of the Act of January 22, 1932, establishing the Reconstruction Finance Corporation (RFC), Congress waived the immunity of real property of the RFC and its subsidiary corporations. Board of County Commissioners v. United States, 123 Ct. Cl. 304 (1952). However, the RFC's authority to pay taxes was contingent upon the corporations holding legal title and having full control and dominion over the

[205]The Pittman case involved the Home Owners' Loan Corporation, a wholly owned and controlled government corporation, upon whose mortgages the state of Maryland imposed a tax. The act establishing the Home Owners' Loan Corporation provided that it, its franchises, capital, reserves, surplus, loans and income shall be exempt from all state and municipal taxes.

[206]Other examples include, but are not limited to, 7 U.S.C. § 1511 (Federal Crop Insurance Corporation); 22 U.S.C. § 2199(j) (OPIC); 33 U.S.C. § 986 (Saint Lawrence Seaway Development Corporation); 29 U.S.C. § 1302(g) (PBGC).

property. 32 Comp. Gen. 164 (1952). Once the RFC declared property to be surplus and transferred the title to the United States, the property was held by and for the use of the United States. Thus, the "cloak of immunity from local taxes descended upon the property" so that no tax liability for state and local taxes could be imposed and agencies could not use appropriated funds to pay such taxes. Id. (property transferred to the Bureau of Mines). See also 36 Comp. Gen. 713 (1957) (property transferred to GSA); 34 Comp. Gen. 319 (1955) (same).

(6) Litigation authority

The question here is whether a government corporation must be represented in litigation by the Justice Department, or whether it can use or hire its own attorneys. The Justice Department has extremely broad authority with respect to litigation involving the federal government. Except as otherwise authorized by law, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested" is reserved to the Justice Department. 28 U.S.C. § 516. Further, "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 519. The term "agency" is defined for purposes of Title 28 as including "any corporation in which the United States has a proprietary interest." Therefore, absent some form of exemption, 28 U.S.C. §§ 516 and 519 apply to wholly owned and at least some mixed-ownership government corporations. In some cases, the authority is reinforced by charter language. For example, 7 U.S.C. § 943(e) expressly makes the Rural Telephone Bank subject to the Attorney General's litigation authority.

The Justice Department has expressed the position that exemptions from the Attorney General's litigation authority should be clear and specific. See Department of Justice, Civil Division Monograph, Compendium of Departments and Agencies With Authority Either by Statute or Agreement to Represent Themselves in Civil Litigation, at 9-10 (October 1982) (hereafter, Civil Litigation Compendium). The Department does not regard a naked sue-and-be-sued clause as enough. Id. at 11. An example of explicit authority is the Pension

Benefit Guaranty Corporation statute noted above. 29 U.S.C. § 1302(b)(1). Even where a corporation has independent litigating authority, Justice believes the corporation should invoke that authority only in programmatic litigation. In non-programmatic litigation which is of government-wide import, like suits under the Freedom of Information Act or Federal Tort Claims Act, Justice urges the corporations to avail themselves of Department representation. Civil Litigation Compendium, at 18-19. The Department's litigating authority does not apply to "non-instrumentality" corporations. Id. at 22 n.13.

The Civil Litigation Compendium recognizes that Justice has acquiesced in self-representation by two corporations, the Federal Deposit Insurance Corporation and the Tennessee Valley Authority, which possess only the simplified version of the sue-and-be-sued clause. Id. at 26-27. The courts have held Justice to that acquiescence and have upheld self-representation authority for the FDIC and the TVA. FDIC v. Irwin, 727 F. Supp. 1073 (N.D. Tex. 1989), aff'd on other grounds, 916 F.2d 1051 (5th Cir. 1990); Cooper v. TVA, 723 F.2d 1560 (Fed. Cir. 1983); Algernon Blair Indus. Contractors, Inc. v. TVA, 540 F. Supp. 551 (M.D. Ala. 1982).

Exemptions may be partial as well as complete. For example, the Export-Import Bank may represent itself "in all legal and arbitral proceedings outside the United States." 12 U.S.C. § 635(a)(1). Under this provision, Justice has advised that it is required to conduct the Bank's litigation inside the United States, and in addition may represent the Bank in stateside arbitration proceedings. 3 Op. Off. Legal Counsel 226 (1979).

One consequence of self-representation is that the corporation must pick up the responsibility of paying the actual representation costs and the various expenses of preparing and presenting the case which would otherwise be borne by the Justice Department's litigation budget. 38 Comp. Gen. 343 (1958) (fees of auctioneer and advertising costs); B-9850, May 23, 1940 (attorney fees, cost of printing appellate brief, other miscellaneous expenses) B-3163, April 24, 1939 (legal services necessary for foreclosing defaulted mortgage or regaining possession of property).

9. Termination of Government Corporations

Unlike a private corporation, a government corporation cannot terminate its existence on its own authority.[207] The power to terminate a government corporation flows from the power to create one, a power clearly held by Congress. Congress may terminate a government corporation for any of a number of reasons. For example, many government corporations were created to address short-term or temporary issues or crises. Logically, once the issue or crisis is resolved, the need for the government corporation is eliminated and it can be terminated. For example, many corporations created to meet the wartime needs of World Wars I and II, and the social and economic crises of the Great Depression, were dissolved once those crises had passed.

Congress terminated government corporations to bring them under its control upon the enactment of the Government Corporation Control Act (GCCA). GCCA required all government corporations then existing to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to reincorporation by act of Congress for such purposes, powers and duties as might be authorized by law. Act of December 6, 1945, Sec. 304(b), 59 Stat. 597, 602.

Sometimes Congress provides itself with a built-in opportunity to determine whether it wants to continue a program carried out by a government corporation. Congress provides a termination date in the enabling legislation or charter of some government corporations, such as the Export-Import Bank, that must be reauthorized if Congress wants them to continue in existence. In other situations, Congress imposes a deadline for a government corporation to fulfill its goals. For example, the Resolution Trust Corporation (RTC), created to manage and resolve failed savings institutions and recover funds by managing and selling the institutions' assets, was directed to terminate no later than December 31, 1995. 12 U.S.C. § 1441a(m). RTC did terminate by that date, having substantially completed its mission. Financial Audit: Resolution Trust Corporation's 1995 Financial Statements, GAO/AIMD-96-123, at 8-9 (July 1996).

Congress may take actions short of termination by converting a government corporation into a private institution. For example,

[207] Moe 1995, supra note 41, at 29.

Congress converted the National Consumer Cooperative Bank from a mixed ownership government corporation to a federally chartered, private banking institution. See B-219801, October 10, 1986. Other government corporations are created with the goal of privatization. For example, the United States Enrichment Corporation (USEC) was directed to operate as a for–profit government corporation and work towards privatization.[208] In 1996, Congress enacted legislation to privatize the USEC.[209]

Congress may also terminate a government corporation due to its dissatisfaction with the corporation's purpose and management. For example, Congress abolished the Synthetic Fuels Corporation in 1985 by rescinding its funding and giving it 60 days to wind up its affairs.[210] Pub. L. No. 99-190, 99 Stat. 1185, 1249 (1985). The Federal Asset Disposition Association met a similar fate. In the face of mounting criticism regarding its method of creation, its purpose, and management, Congress dissolved it as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73; 103 Stat. 183.[211]

In other cases, Congress has changed its view and gone back and forth on the form of a government corporation. For example, Congress replaced the Panama Canal Company, a government corporation, with the Panama Canal Commission, an appropriated fund agency, because it wanted to maintain greater oversight of the Canal during the remaining years of U.S. Control. See B-280951, December 3, 1998. Subsequently, Congress granted the Commission greater autonomy and converted it into a revolving-fund agency. Id. at 6. Finally, Congress expanded the Commission's business-like

[208] 42 U.S.C. §§ 2297d and 2297d-1

[209] USEC Privatization Act, Pub. L. No. 104-134, tit. III, §§ 3101-3117, 110 Stat. 1321-335 (1996).

[210] For a more detailed discussion on this, see Moe 1995, supra note 41, at 19-22.

[211] For more detailed discussion on this, see Moe 1995, supra note 41, at pages 22-26.

powers to its final status, when the canal was transferred from U.S. control, "as an autonomous entity that [could] compete as a commercial enterprise in international transportation markets." Id. at 8.

C. Nonappropriated Fund Instrumentalities

"Their birth is funded by the Government. The seed money for their creation came from the Government. They are managed by Government people who are paid Government salaries. They usually occupy Government facilities, perhaps on some cost-reimbursable arrangement, but on Government real estate, using Government facilities. They perform essentially a morale-building function for Government personnel, which the Government would otherwise have to appropriate funds for if it weren't having it done in this manner. There is a very close identity between them and the Government people with whom they are working every day. They are providing service to Government people engaged in a Government mission. As I say, this is just off the top of my head." Testimony of Louis Spector, Commissioner of the Court of Claims on nonappropriated fund instrumentalities.[212]

1. Introduction

There are certain items and services that employees and officers of the United States government need to carry out government business. Office supplies, telephones, and computers come to mind. There are other items and services that support the efforts of government employees and officers to carry out the government's business by fulfilling their morale, welfare and recreation needs (commonly referred to as MWR). Often these MWR items and services have been viewed as frivolous and extravagant expenses that are unnecessary to carry out government business and should not be paid from tax dollars. However, bureaucrats do not live by red tape alone. While the private sector can provide some of these MWR needs, it has been unable or unwilling to meet all MWR needs at every location. Thus, the government has turned to other sources, such as non-appropriated fund instrumentalities or activities, to supply MWR items and services. Although non-appropriated fund instrumentalities or NAFIs, as they are commonly referred to, are related to the government and provide a wide range of government-related services and activities, they occupy a unique legal status.

[212] Jurisdiction of U.S. Courts, Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 9 (1969).

Before we turn to the various issues involved in NAFIs as we know them today, it is useful to understand their history and development.

a. Historical Background

The need to provide services and items to fulfill the morale, welfare and recreational needs of officers and employees originated long before the establishment of the United States Government and far from our shores. Persons providing such support have existed since the times of the Roman Legions. "Caesar alludes to the itinerant merchants who followed the legions, selling items not considered necessaries by quartermasters."[213] From the time of the Roman Legions to the European armies and navies of the 17th and 18th centuries, these men, known as sutlers,[214] followed armies and met ships in port in order to supply the soldiers and sailors with provisions and contraband. Id. Due to the monopolistic prices charged by sutlers, sailors organized their own ship cooperatives called "slop chests." Id.

The United States Government has, at times, directly provided items and services to meet the morale, welfare, and recreational needs of its officers and employees while, at other times, it has relied upon private sources, albeit under governmental control, to provide such goods and services. Beginning with the American Articles of War of 1775, sutlers, itinerant or camp-following merchants, were authorized to sell to the troops items not provided by the Government such as "victuals, liquors, or other necessaries of life"[215] for the use of soldiers.[216] The American Articles of War of 1775 also regulated the sutlers' conduct, hours, and quality of items sold.[217]

[213]Michael Francis Noone, Legal Problems of Non-Appropriated Funds, Mil. L. Rev. Bicentennial Issue, 1975 (Army Pamphlet 27-100) 357, 361. This article was originally published as Appendix 1 of the Hearings on S. 3163, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 90th Cong. 2d Sess. 201 (1968). We will cite to pages in the Military Law Review.

[214]The term "sutler" means a small vendor, derived from the word "soltelen" which means to befoul or perform mean duties. Id. at 361.

[215]Winthrop's Military Law and Precedents, American Articles of War of 1775, Article LXVI, 953, 958 (2d ed., 1920 reprint) (hereafter cited as Winthrop).

[216]Paul J. Kovar, Legal Aspects of Nonappropriated Fund Activities, 1 Mil. L. Rev. 95, 96 (Army Pamphlet 27-100-1) (1958).

[217]Winthrop, supra note 215, Art. XXXII, LXIV, LXV, and LXVI, at 953.

For example, although sutlers were not a component part of the Army, they were subject to the orders and regulations of the Continental Army and later the United States Army and local commanders.[218] Sutlers were not permitted to sell liquor, victuals or provide entertainment after nine at night, before the beating of the reveilles, or during Sunday religious services.[219] Commanding officers had duties relating to suttling which required them to see that sutlers supplied soldiers with good and wholesome provisions at a reasonable price.[220] Commanding officers were prohibited from charging exorbitant prices for houses or stalls let out to sutlers or charging any duty upon sales or having any financial interest in sales.[221] The American Articles of War of 1775 also established a fund for fines collected from soldiers and officers for behaving indecently or irreverently during religious services.[222] The fund was to be used to aid sick soldiers of the troop or company to which the offenders belonged.[223] This is the first record we have of a United States Government nonappropriated fund activity.[224]

Sutlers were permitted to sell to the soldiers on credit and the paymaster could deduct the amount from the soldier's pay and pay the sutler directly.[225] In 1847, Congress abolished sutlers' rights to have such a lien on a soldier's pay. Act of March 3, 1847, 9 Stat. 185. Congress reinstated and abolished the sutlers' right to have a lien on a soldier's pay several times throughout the next decades.[226] In 1862,

[218] Id., Art. XXXII, at 956.

[219] Id., Art. LXIV, at 958.

[220] Id., Art. LXV, at 958.

[221] Id., Art LXVI, at 958.

[222] Id., Art. II, at 953.

[223] Id.

[224] Stephen Castlen, Let the Good Times Role: Morale, Welfare, and Recreation Operations, Army Law., 3, 6 (June 1996) (Army Pamphlet 27-50-283).

[225] Id. at 6.

[226] E.g., Act of June 12, 1858, 11 Stat. 332, 336 (repealed the legislation depriving sutlers of the right to have a lien on a soldier's pay); Act of December 24, 1861, 12 Stat. 331 (abolished the sutlers right to have a lien on a soldier's pay).

Congress enacted a bill which provided for the appointment of sutlers in the Volunteer Service, set out their duties, and authorized sutlers to have a lien on part of a soldier's pay. Act of March 19, 1862, 12 Stat. 371. This act established guidelines for the activities and service of sutlers to the Army and their regulation by the War Department. The commanding officer of each brigade was required to have the commissioned officers of each regiment in the brigade select a sutler for their regiment, who would be the sole sutler for that regiment. Id. The act listed specific articles that sutlers could sell to soldiers including food, toiletries, reading materials, tobacco, stationery and other items which in the judgment of the inspectors general were for the good of the service. Id. However, the sale of liquor was prohibited. Id.

The sutlers were assessed fees for the privilege of doing business. The fees were based upon the average number of soldiers in a unit. Fines were assessed for violation of regulations. Both were deposited into the "post fund" administered by a group of officers, known as the "Council of Administration," along with the post commander. Kovar, supra note 216, at 97. The post fund, analogous to what we now call a NAFI, was used to aid indigent widows or children of deceased soldiers, disabled soldiers discharged without pensions, to buy books and periodicals for the post library, and to support the post school and band. Id. In 1835, company funds, subject to the control of the post commander, were authorized by Army regulations to derive income from rental of billiard tables, the sale of grease from the company mess and savings from the economical use of food. Noone, supra note 213, at 363.

The sutler system was subject to many abuses; soldiers were cheated, charged usurious interest, and military officials and the merchants were involved in fraud and corruption. Appropriated Fund Support for Nonappropriated Fund and Related Activities in the Department of Defense, GAO/FPCD-77-58, 4 (August 31, 1977). In 1866, Congress responded to these abuses by abolishing the office of sutler effective July 1, 1867. Id.; 14 Stat. 328, 336 (1866). With the abolishment of sutlers, Congress required the subsistence department of the Army to sell articles, designated by the inspectors general, at cost. 14 Stat. 328, 336 (1866). In 1867, Congress authorized the Commanding General of the Army to permit the establishment of trading posts on certain military posts. Joint Resolution of 30 March 1867, 15 Stat. 29. Where the commissary department was prepared to supply stores to soldiers (in compliance with the 1866 act, 14 Stat. 328), traders were not permitted to remain at such posts or sell any goods kept by the commissary department. Id.

In 1870, Congress repealed the Joint Resolution of March 30, 1867, and enacted legislation which authorized the establishment of post traders in certain locations to be under the protection and control of the military as camp followers and subject to the War Department's regulations.[227] Act of July 15, 1870, 16 Stat. 315, 319-20. The War Department established general policies regulating the post traders which were carried out by a council of administration for the post. Kovar, supra note 216, at 100 n.28. Unlike the sutlers before them, the post traders did not have the right to a lien on a soldier's pay. Id.

The Secretary of War did not appoint a post trader at all military posts. Kovar supra note 216, at 101. At posts where there were no post traders, commanders were authorized to establish canteens to supply troops with articles for their entertainment and comfort at moderate prices. The following year, in 1890, all posts were authorized to establish canteens. Post commanders were permitted to make government buildings available to house canteens and its activities. An officer "in charge of canteen" managed the canteen assisted by a "canteen council" and its profits were distributed among the participating companies. Id. A canteen was established either on credit or from funds of the companies benefiting from the canteen. To promote and expand canteens, the War Department prohibited company fund activities from selling any item sold by the canteen. Id. Canteens were authorized to use profits to purchase sporting equipment and any items that would contribute to the "rational enjoyment and contentment of the soldiers." Id.

Canteens evolved into the post exchanges which performed essentially the same functions. Kovar, supra note 216, at 102; Noone, supra note 213, at 365. By 1893, the post exchange had taken over the services provided by the post trader and Congress prohibited the

[227]This act authorized the establishment of post traders at certain posts on the frontier not in the vicinity of any city or town when, in the Secretary of War's judgment, such posts were necessary to accommodate emigrants, freighters and other citizens. In 1876, Congress authorized the Secretary of War to appoint post traders at all military posts regardless of location. Act of July 24, 1876, 19 Stat. 100.

Secretary of War from making further appointments of post traders or from filling vacancies. Act of January 28, 1893, 27 Stat. 426. In 1895, the War Department established post exchanges at all military posts. Kovar, supra note 216, at 102, citing General Order No. 46, July 25, 1895. The post exchanges were to provide a reading and recreation room, a store, a restaurant, and other facilities to supply at reasonable prices, articles (not supplied by the Government) for rational recreation and amusement. Id. Post exchanges were authorized to use government buildings and were managed by an "officer in charge" and a council which reported to the post commander. Id.

Although the Army regulated post exchanges and provided direct support through free government space and the use of military officers to manage their operations, the post exchanges were not considered to be an agency or instrumentality of the United States. Noone, supra note 213, at 365. The Judge Advocate General of the Army described the legal status of the post exchange in an 1893 opinion:

"Now the Post Exchange is not a United States institution or branch of the United States military establishment, but a trading store permitted to be kept at a military post for the convenience of the soldiers. It is set up and stocked, not by means of an appropriation of public moneys, but by means of the funds of companies, etc.; the officers ordering the purchases [are] responsible for the payment, not the Government." Noone, supra note 213, at 365, citing 61 JAG Record Book, 1882-1895, 479 (1893).

Congress limited the aid that the Army could provide to the post exchanges in the Army's Appropriations Act for Fiscal Year 1893 as follows:

"And provided further, That hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use by post exchanges of public buildings or public transportation when, in the opinion of the Quartermaster-General, not required for other purposes." Act of July 16, 1892, 27 Stat. 174, 178.[228]

The post exchange and post and company funds continued to carry out MWR functions until after World War I. Kovar, supra note 216, at 102. After World War I, the War Department created and expanded

[228] This law is now codified at 10 U.S.C. § 4779.

organizations and functions to provide services such as motion pictures and library facilities, recreation centers and programs, child care centers, restaurants and other services for both service members and their family members. Castlen, supra note 224, at 8; Kovar, supra note 216, at 102-103. The War Department established a Morale Branch in 1941 to provide MWR services. Id. During World War II, the post exchanges were reorganized into a central organization known as the Army Exchange Service (currently in operation and now known as the Army and Air Force Exchange Service or AAFES) within the Morale Branch of the War Department. Id.

The military nonappropriated fund activities have grown in size and complexity. There are also nonappropriated fund activities serving civilian officers and employees of the government. However, their basic purpose is the same; to provide for the morale, welfare and recreation of government officers and employees.

b. Defining the Nonappropriated Fund Activity

"I am worried about the definition of 'nonappropriated funds.' Every time I think of one, you give me another one; then I think of another possibility." Rep. Wiggins, House of Representatives (1969).[229]

While defining the term "nonappropriated funds" may pose some challenges, we can agree that the term appropriated funds refers to funds provided in a regular annual appropriation act or a continuing or permanent appropriation created when a statute authorizes the obligation and expenditure of funds and designates the funds to be used. 63 Comp. Gen. 331 (1984). An exception to this general rule occurs when Congress designates funds by statute to be nonappropriated funds, which are not subject to the statutory controls and restrictions applicable to appropriated funds. See, B-217578, October 16, 1986; 12 U.S.C. § 481 (1982) (funds available to the Comptroller of the Currency); 12 U.S.C. § 244 (1982) (funds available to the Board of Governors of the Federal Reserve). However, the term "nonappropriated funds" in those examples describe the status of those funds and not the instrumentalities which are the subject of our discussion. NAFIs are different from

[229]Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 18-19 (1969), quoted in McDonald's Corporation v. United States, 926 F.2d 1126, 1130 (Fed. Cir. 1991).

both the agencies funded by appropriations and those financed by funds deemed to be "nonappropriated."

As recognized by Representative Wiggins, it is difficult to define what NAFIs are, since even the few characteristics generally used to describe them are not absolute. While NAFIs act in their own name, federal agencies create them and regulate their activities. However, NAFIs are not federal agencies or government corporations. They are not typical private or commercial enterprises, although they may operate on a for-profit basis. GAO views their operation with mainly nonappropriated funds as the defining characteristic of NAFIs:

"NAFIs encompass a wide range of activities and resist a general definition. They share common characteristics in that they are associated with governmental entities, and, to some extent, are controlled by and operated for the benefit of those Governmental entities. However, the essence of a NAFI is that it is operated with the proceeds of its activities, rather than with appropriated funds." 64 Comp. Gen. 110, 111 (1984).

The Department of Defense defines a nonappropriated fund instrumentality as:

"An integral DoD organizational entity that performs an essential government function. It acts in its own name to provide or assist other DoD organizations in providing MWR programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the Heads of DoD Components. As a fiscal entity, it maintains custody of and control over its NAFs [nonappropriated funds]. It is also responsible for the exercise of reasonable care to administer, safeguard, preserve, and maintain prudently those appropriated fund resources made available to carry out its function. It contributes, with its NAFs to the MWR programs of other authorized organizational entities, when so authorized. It is not incorporated under the laws of any state or the District of Columbia and it enjoys the legal status of an instrumentality of the United States." "Establishment, Management, and Control of Nonappropriated Fund Instrumentalities," Department of Defense Directive 1015.1, Encl. 2, ¶ 2, August 19, 1981 (hereafter DoDI 1015.1).

One court described NAFIs as follows:

A non-appropriated fund activity is one to which the government has initially provided funds to permit it to begin operation. The governmental loan is repaid out of the profits earned by the activity. Thus, the activity is created by the government with governmental funds for governmental personnel, and is administered by governmental employees for the use and benefit of the United States. Bowen v. Culotta, 294 F. Supp. 183, 185 (E.D. Va. 1968).

From the Bowen case, GAO identified the following characteristics for determining whether a particular activity is a nonappropriated fund activity:

"1. The activity is established under the authority or sanction of a Government agency with or without an initial advance of Government funds.

"2. The activity is created and run by Government officers or employees and/or their dependents.

"3. The activity is operated for the benefit of Government officers or employees and/or their dependents.

"4. The operations of the activity are financed by the proceeds therefrom rather than by appropriations." B-167710-O.M., May 6, 1976.

Although many NAFIs share these characteristics, GAO noted that they are not absolute and should be applied on a case-by-case basis in order to determine whether an entity is a NAFI. Id.

One important characteristic that defines NAFIs, and also distinguishes them from federal agencies or private commercial enterprises is the purposes for which they are created. That is, to meet the morale, welfare and recreational needs of government officers and employees. DoD articulates the importance of MWR programs, many of which are carried out by NAFIs, as follows:

"MWR programs are vital to mission accomplishment and form an integral part of the non pay compensation system. These programs provide a sense of community among patrons and provide support services commonly furnished by other employers, or other State and local governments to their employees and citizens. MWR programs encourage positive individual values, and aid in the recruitment and retention of personnel. They provide for the physical, cultural, and social needs and general well-being of Service members and their families, providing community support systems that make DoD bases temporary hometowns for a mobile military population." "Morale, Welfare, and Recreation (MWR), DOD Instruction No. 1015.10" ¶ 4.2, November 3, 1995.

While many MWR needs are met by profitable commercial-type operations, such as the post exchanges, child care centers, golf courses, restaurants, and gyms, profits are not the overriding goal. Although they are defined as using nonappropriated funds, in cases where NAFIs have not been profitable or self-sustaining, the Government has subsidized their operations with appropriated funds in order to ensure the MWR needs are met. Where profitable, the disposition of NAFI profits also differs from typical commercial enterprises which would normally benefit owners or stockholders. For example, DoD NAFIs use their profits to support MWR programs.

Although some are capable of providing services or goods needed by the Government, the Comptroller General has held that as a general rule, nonappropriated fund activities "are not in the business of supplying the Government with its procurement needs," unless there are exigent circumstances or situations where it is impracticable to obtain services from others. 58 Comp. Gen. 94, 98 (1978).

Serving the needs of government officers and employees with goods and merchandise purchased through NAFIs is not limitless. NAFIs provide government officers and employees with items and services for their personal consumption, not for their business, profit making motives. Covill v. United States, 959 F.2d 58 (6th Cir. 1992) (Coast Guard Warrant Officer received a punitive letter of reprimand because he purchased merchandise from a NAFI purportedly for personal use, but instead, used the merchandise in his restaurant where he sold it at retail to the general public.)

2. Legal Status

a. Authority for Creation

Statutory authority is not needed to create nonappropriated fund activities.[230] In fact, many NAFIs were created and regulated by governmental agencies, and only later received congressional approval and, sometimes, statutory authority for their operations. See B-167710-O.M., May 6, 1976. This lack of congressional authority for their creation and regulation does not, however, invalidate their legal status. See Dugan v. United States, 34 Ct. Cl. 458, 466-67 (1899). In a case involving nonappropriated fund activities, specifically the military post exchanges, the Supreme Court stated:

[230]Compare 31 U.S.C. § 9102, which provides that: "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."

"That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942).

Of course, this does not mean that Congress cannot legislate to create a nonappropriated fund activity or to approve one already in existence. E.g., 7 U.S.C. § 2279b (operation of Graduate School of Department of Agriculture as a nonappropriated fund instrumentality).

b. Relationship to the United States Government

"It would not be an exaggeration to call their legal status bizarre. They are operations of the federal government, yet they are not."[231]

Despite their peculiarities, NAFIs are now recognized as being federal instrumentalities, albeit "a special breed of federal instrumentality which cannot be fully analogized to the typical federal agency supported by federal funds." Cosme Nieves v. Deshler, 786 F.2d 445, 448 (1986).

The Standard Oil decision, 316 U.S. 481 (1942), involved a tax levied upon sales to NAFIs. The California Motor Vehicle Fuel License Tax Act imposed a license tax on the privilege of distributing motor vehicle fuel. By its terms, the tax was inapplicable to fuel sold to the United States government. California insisted that Standard Oil levy the tax on sales it made to the U.S. Army Post Exchanges in California. In the suit to recover payment, Standard Oil (with the United States as "amicus curiae") claimed the sales to the Post Exchanges were exempt under the Act. Standard Oil also argued that if the Act were construed to require payment on such sales, it would impose an unconstitutional burden upon instrumentalities or agencies of the United States. The California courts found for the state on both issues. Id. at 482.

Upon appeal to the Supreme Court, the determining issue was the relationship between post exchanges and the United States government. The Supreme Court recognized several factors as important indicia of governmental status: The post exchanges were established pursuant to regulations of the Secretary of War

[231]Noone, supra note 213, at 359.

statutorily sanctioned by Congress. The commanding officer of an army post had virtually total authority to establish and manage the exchange. The supervisory councils for the exchanges consisted of the commanding officers of the post units and they served in that capacity without any compensation other than their regular pay. The purpose of the post exchanges was to provide a convenient source of low priced goods for soldiers. The Government did not assume any of the financial obligations of the post exchanges, but was responsible for the funds obtained. Profits were used only for the welfare, pleasure and comfort of the troops.

"These regulations and the practices under them establish the relationship between the post exchange and the United States government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined . . . .

"[W]e conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." Standard Oil v. Johnson, 316 U.S. at 483, 485.

For this reason, the Supreme Court concluded, the state could not tax the fuel sold to the post exchanges. Id. at 485. The relationship of NAFIs to the Government has also been considered in cases involving contract matters. For example, in Nimro v. Davis, 204 F.2d 734 (D.C. Cir. 1953), suit was brought against the board members of a Naval Gun Factory Lunchroom Committee for "services rendered and expenses incurred." Id. at 734. The committee was composed of naval officers and civilian employees who argued that the board, as an instrumentality of the Navy Department, was immune from suit to the same extent as the Department itself. To counter this defense, the plaintiff maintained that he was suing the members of the board in their representative capacity as custodians of a private fund, not as government employees. Id. at 735.

The court held that the Naval Gun Factory Lunchroom Committee was a nonappropriated fund instrumentality because it was made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions, to carry out a purpose declared by him to be an integral part of the Department. The court found the individuals comprising the NAFI's board to be acting for and on behalf of the United States, and not in any private capacity. As such, the suit comprised an action against the United States that could not be maintained without its consent. Id. at 736.

Another contract case concerned a company which agreed with a Post Office Employee Welfare Committee to install vending machines in the Post Office for a term of five years. The Employee Welfare Committee notified the vending machine company of its intent to terminate the contract before the end of the five year term. The company sued the employees to enforce the contract. In reply, the employees moved to dismiss the case, arguing that the suit was not against them in their individual capacities, but against the Employee Welfare Committee—an instrumentality of the United States Government which was entitled to governmental immunity.

Applying the elements set forth in the Standard Oil decision, the court held that the Post Office employee welfare committee constituted an integral part of the Postal Service and was an instrumentality of the United States for purposes of suit. Automatic Retailers v. Ruppert, 269 F. Supp. 588 (S.D. Ia. 1967). Since the United States had not consented to suit, the court dismissed the case. Id. at 592. See also Employees Welfare Comm. v. Daws, 599 F.2d 1375 (5th Cir. 1979). The court found that the committee was established pursuant to regulatory authority, the Postal Service appointed employees to carry out the contractual and managerial duties of the committees, the Postal Service regulated and controlled vending stands and machines, and the primary objective of the committees was to further the interests of the Postal Service. Automatic Retailers of America, 269 F. Supp. at 591.

However, there are also times when NAFIs are not considered government instrumentalities; hence, their bizarre legal status. For example, the actions of nonappropriated fund employees are not always attributable to the government, as seen in cases involving government mishandling in receipt of bids. There was a time when, under contract with base exchanges, telegraph offices were routinely operated on military bases by nonappropriated fund activity employees. On occasion, prospective government contract bidders telegraphed their bids within the required time frame for bid acceptance, but the bids were nevertheless delivered late to the contracting office by the telegraph office. Since the government's mishandling of bids provided a basis for accepting an otherwise late bid, prospective bidders have argued that the delay in delivery by the base exchange telegraph office was attributable to the government. 50 Comp. Gen. 76 (1970); B-186794, November 11, 1976. GAO held that where the nonappropriated fund activity acts as the agent for the telegraph company, as the contract stipulated in those cases, the activity was not an instrumentality of the government, and the NAFI's actions were not attributable to the government.

3. Sources of Funding: The Use of Appropriated Funds for Nonappropriated Fund Instrumentalities

"Although for some purposes nonappropriated fund activities are considered instrumentalities of the Government, they are generally self-supporting and do not receive appropriated funds from the Congress." B-215398, October 30, 1984.

a. Self-Supporting or Subsidized?

The name suggests that a NAFI is "operated with the proceeds of its activities, rather than with appropriated funds." 64 Comp. Gen. 110, 111 (1984). That sounds simple enough, but the reality is not so simple. Part of the reason for this is that some people think the government should fund MWR using appropriated funds, while others find that suggestion outrageous. Some argue for direct government support for the MWR services provided by NAFIs because there is a legitimate business need to provide MWR support for government officers and employees. Others, like private retailers in competition with NAFIs, argue that recreational expenses should be paid for by the government through traditional procurement from the private sector, not by making NAFIs compete with the private sector. Others still argue that the taxpayers should not pay for any employee recreational expenses. That group advocates that NAFIs should be self-supporting and their profits used for MWR expenses. The tension between these factions has led to a complicated mix of appropriated and nonappropriated funding for "nonappropriated fund instrumentalities."

b. Appropriated Funds for Morale and Welfare: The Early Rule

Whether appropriated funds are legally available to support NAFIs depends on whether appropriated funds are legally available for MWR expenses. The general rule, established in early decisions, is that expenses associated with employee morale, welfare and recreation cannot be paid from appropriated funds unless specifically authorized by law. 18 Comp. Gen. 147 (1938) (River and harbor appropriation not available to provide recreational activities for workers); 27 Comp. Gen. 679 (1948) (Navy appropriations not available to hire full-time or part-time employees for recreational programs for civilian employees of Navy). The rationale for the rule was that those types of expenditures would only have an indirect bearing on the purposes for which the appropriations were made, while simultaneously satisfying entirely personal expenses. E.g., 18 Comp. Gen. 147.

In addition, several laws specifically prohibited the use of appropriated funds for certain MWR expenses. As early as 1892, Congress passed legislation prohibiting the use of appropriated funds of the various armed forces for the exchanges. Act of July 16, 1892, 27 Stat. 174, 178, now codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively). More recently, Congress passed a law expressly prohibiting the Department of Defense from using appropriated funds for equipping, operating, or maintaining golf courses at DOD facilities or installations. 10 U.S.C. § 2246(a).[232] In 1998, GAO interpreted this prohibition as precluding the use of appropriated funds to install or maintain pipelines for watering an Army golf course. B-277905, March 17, 1998. Although other laws permitted DOD to participate in water conservation projects, or federal agency cooperative efforts to resolve water resource issues in concert with conservation of endangered species, those laws did not override the prohibition of section 2246. Id.

The rule appears to be simple—that appropriated funds may not be used to support NAFIs unless specifically provided by law. However, again, like many things in law, and life, it is not, in fact, that simple. Both the analysis described in the general rule and congressional action have evolved.

c. The Current Trend: Use of Appropriated Funds

Agencies have used the necessary expense doctrine in order to analyze whether to pay for certain morale, welfare and recreation expenses. The test evaluates whether the agency has a legitimate interest in the MWR needs of its employees. The cases have increasingly recognized that certain items or services contribute directly to an agency's mission by enhancing employee morale and productivity. For example, in cases where employees are located at a remote site where MWR facilities would not otherwise be available

[232]Section 2246(b) exempts golf courses at installations outside the United States or at remote and isolated locations as designated by the Secretary of Defense.

and such expenses would be necessary for recruitment and retention of personnel, GAO has held that appropriated funds may be used to pay for MWR expenditures. See, e.g., 54 Comp. Gen. 1075 (1975) (purchase of television set for crew on Environmental Protection Agency ship gathering and evaluating water samples on multi-day cruises); B-144237, November 7, 1960 (transportation of musical instruments, sports and recreational equipment to isolated Weather Bureau installations in the Arctic); B-61076, February 25, 1947 (purchase of ping pong paddles and balls by Corps of Engineers to equip recreation room on a seagoing dredge justified by policy in War Department regulations and necessary expense for the recruitment and retention of employees).

The military's use of appropriated funds for MWR expenses has differed from civilian agencies for several reasons. First, in both the context of the necessary expense rule and in obtaining congressional action, it is easier for the military to justify MWR expenses due to the nature of its mission, the remoteness of many of its locations, and hardships imposed on military members and families. Congress has also specifically permitted the military to assist NAFIs in several respects. For example, the same law that in 1892 prohibited the use of appropriated funds for the post exchanges, authorized those NAFIs to use public buildings or transportation not required by the military.[233]

Congress has specifically authorized the use of certain appropriated funds for MWR expenses. See 10 U.S.C. § 2241 (authorizing the use of Operation and Maintenance appropriations for MWR). While this provision was made permanent in 1983, GAO cases have referred to annual appropriation acts making O&M appropriations available for morale and welfare expenses since at least 1965. See B-154547-O.M., July 7, 1965. Congress has appropriated advances for the establishment of NAFIs which were to be repaid to the Treasury. See B-156167, July 18, 1967 (Advances to Midshipmen's Store Fund). In some cases, Congress repealed the statutory authority requiring the repayment to the Treasury of sums advanced to NAFIs. Id. at 2.

[233]Act of July 16, 1892, 27 Stat. 174, 178, codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively).

GAO decisions have recognized all of these factors in determining the propriety of using appropriated funds to support NAFIs. In internal memorandum, GAO considered whether travel relating to business of the Army and Air Force Exchange Service (AAFES) could be paid from appropriated funds. B-120139-O.M., August 16, 1954. Since expenses for travel involving public business could be paid from appropriated funds, GAO analyzed whether travel involving AAFES business qualified as public business. The Comptroller General noted that AAFES is a government instrumentality under the executive control of officers of the services, who receive pay and allowances from appropriated funds while assigned to the exchanges. Thus, travel involving command supervision of exchanges is public business and the use of appropriated funds is reasonable. For example, travel for the purposes of inspecting, auditing, or investigating exchange activities, attending exchange conferences, coordinating exchange matters or attending exchange schools involve command supervision and may be paid from appropriated funds as travel in connection with public business. However, the Comptroller General said that travel for the purpose of purchasing exchanges supplies for resale did not relate to command supervision and could not be considered as travel on public business. Id.

A few years later, GAO considered whether travel by a member of the Army in order to participate in a field artillery basketball tournament as a nonparticipating coach was travel for public business which could be paid from appropriated funds. B-133763, November 13, 1957. Army regulations provided that nonappropriated funds could be used to pay the expenses of military members participating in sports program activities. However, nonappropriated funds could not be used to pay expenses of official travel of military personnel when performing command supervision of the Army sports programs. Applicable travel regulations provided that travel conducted for public business (defined as relating to activities or functions of the service to which the traveler was attached) would be paid. So, was the nonparticipating coach engaged in official government business or not? GAO held that while a tournament was recognized as part of athletic or recreational programs of the Army, it did not appear to be an activity or function of a field artillery battalion and would not constitute public business under the regulations. GAO advised the requestor to seek reimbursement from nonappropriated funds. Id.

GAO has considered whether appropriated funds could be used to pay other expenses on behalf of NAFIs, such as construction, repairs or leasing of buildings and facilities. Generally, those expenses can be paid from appropriated funds. For example, in B-147516-O.M., January 24, 1962, the Comptroller General was asked whether it was proper for the Air Force to use appropriated funds to pay for the modification, alteration, or repair of buildings or facilities used by NAFIs. Both the Secretary of Defense's authority and Air Force regulations supported the maintenance of MWR programs with appropriated funds. The memorandum noted that Congress had recognized the use of public buildings by exchanges in a permanent provision in the Army's appropriation act since fiscal year 1893.[234] As early as 1903, Congress had authorized the use of appropriated funds of the Army for construction, equipment and maintenance of buildings for exchange activities. Id. at 3.

While more current appropriations did not include specific authorization for such expenses, GAO deferred to the interpretation of the military departments that the general authorization of appropriated funds for repair and maintenance of facilities included those used of MWR activities. Finally, Congress had been notified of the military departments' interpretation. For these reasons, the Air Force could use appropriated funds to pay for the repair and alteration of NAFI facilities. Id.

In other cases, GAO addressed whether military departments could use appropriated funds for leasing and other property services on behalf of nonappropriated fund activities. In effect, GAO was asked whether DOD could use appropriated funds to lease hotel facilities for a nonappropriated fund activity. GAO answered, "yes," albeit with some hesitation. In B-154547-O.M., October 20, 1964, DOD cited its authority to conduct all affairs for the department, including welfare activities, in addition to the availability of Operation and Maintenance (O&M) appropriation for welfare and morale, to justify leasing buildings and space for NAFIs. GAO said "not good enough," noting that DOD had no specific authority to lease a building for a nonappropriated fund activity. Unless the Department of Defense could provide another interpretation of its authority to lease

[234]Act of July 16, 1892, 27 Stat. 174, 178, codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively).

facilities for nonappropriated fund activities, GAO would conclude that DOD could not do so. Id. In a subsequent memorandum, GAO altered course, deferring to DOD's interpretation since DOD was authorized to lease buildings for military purposes and MWR use could reasonably be construed to constitute a military purpose. B-154547-O.M., July 7, 1965. In another office memorandum dated February 21, 1975,[235] GAO analyzed whether the Air Force could acquire land solely for recreational purposes. GAO looked to the Air Force's authority to conduct welfare functions and the availability of DOD O&M appropriations for welfare and recreation in conjunction with the availability of appropriations to acquire land by lease or purchase. Id. Deferring to DOD's discretion in interpreting the extent of its authority and responsibilities, GAO agreed that sponsoring recreational and social activities could be considered activities with a military purpose and the Air Force could acquire land interests for such activities. Id.

While GAO decisions increasingly recognized the use of appropriated funds for expenses related to MWR, GAO also reported on the improper use of appropriated funds to support nonappropriated fund activities, such as restaurants, stores, golf courses, and theaters, and recommended changes in accounting, billing, reimbursements and legislation. In a 1949 report on nonappropriated funds, GAO reported that there was a "widespread and growing practice . . . of withholding from the Treasury and diverting to unauthorized purposes substantial sums of money coming into the hands of persons in the service of the United States in connection with the performance of their official duties." B-45101, August 10, 1949, p.1. GAO had several concerns: (1) whether these activities were authorized to withhold revenues, donations and contributions arising from such activities; (2) the unreimbursed or "free" use of public property and funds in connection with revenue producing activities; and (3) GAO's lack of specific authority to audit NAFIs. Id. at 5-7. While not questioning the validity of NAFI purposes, to meet MWR needs, GAO questioned whether Congress had by law authorized these types of expenditures, and whether they should not be self-supporting. Id. at 7-8.

[235]Unnumbered case dated February 21, 1975, found in GAO Manuscript Volume 642, February 1975, Pt. B, Appendix 10.

In 1975, Congress authorized GAO to audit the operations and accounts of nonappropriated fund activities.[236] In a 1977 report, GAO listed those NAFIs, a brief description of each one, their assets, and gross revenues. Magnitude of Nonappropriated Fund and Related Activities in the Executive Branch, GAO/FPCD-77-28, April 25, 1977. The report noted that some agencies maintained that their programs were not NAFIs, but rather, private associations not officially a part of the government. “Varying interpretations are understandable,” the report stated, “since there is no official definition of what is or is not a nonappropriated fund activity.” Id. at i. GAO cited an earlier OMB study which found that the lack of a government-wide definition of NAFIs caused confusion and precluded a reliable review of all NAFIs. Id., citing OMB, Study of Procurement Payable for Nonappropriated Funds (August 1975).

Later that same year, GAO reported on NAFIs in DOD and concluded that, while NAFIs operated mainly with self-generated revenue, DOD was providing some appropriated fund support, including funding transportation which should have been funded by the NAFIs. Unauthorized and Questionable Use of Appropriated Funds to Pay Transportation Costs of Non-Appropriated Fund Activities, Department of Defense, GAO/LCD-76-233, June 3, 1977. While GAO noted that annual DOD appropriation acts had generally provided funds for welfare and recreation, Congress had not specifically provided funds for transportation of merchandise for resale through NAFIs. Id. at 1. Thus, the use of appropriated funds for transportation of exchange goods was only permitted when the goods were carried on conveyances, owned, leased or chartered by the Government, where the Government was already obligated to pay for the space whether used or not. Id. GAO recommended that the Secretary of Defense: (1) direct the NAFIs to reimburse the paying appropriation for excess transportation costs; (2) institute procedures for properly charging NAFIs for transportation services; and (3) recover costs for improper appropriated fund support provided to NAFIs. Id. at ii - iii.

Later in 1977, GAO reported that the government spent over $600 million each year to subsidize DOD NAFIs. Appropriated Fund

[236]Pub. L. No. 93-604, January 2, 1975, § 301, 88 Stat. 1959, 1961-62, codified at 31 U.S.C. § 3525.

Support for Nonappropriated Fund and Related Activities in the Department of Defense, GAO/FPCD-77-58, August 31, 1977. GAO also reported that appropriated fund support was understated because of the failure to include certain costs, such as personnel costs, indirect costs, and other unrecognized costs. Id. at 30. Further complicating matters, GAO reported that other costs were overstated. Id. In testimony on the findings of this report, GAO stated that the three major concerns with appropriated fund support were: (1) the use of military personnel to perform non-military duties in NAFI activities; (2) the lack of a system for accurately reporting appropriated fund support; and (3) the lack of specific guidelines for providing appropriated fund support. Appropriated Fund Support for Nonappropriated Fund and Related Activities of the Department of Defense, Testimony before the Nonappropriated Fund Panel of the Subcommittee on Investigations of the Committee on Armed Services, September 27, 1977.

The House Armed Services Committee, in its report on the National Defense Authorization Act for fiscal year 1987, directed DOD to use appropriated funds primarily to support MWR activities that do not generate revenues and to minimize the use of appropriated funds for MWR activities that generate revenues. H.R. Rep. No. 99-718, at 165-66 (1986). DOD divided its MWR activities into three categories receiving varying degrees of appropriated fund support. DOD categorized activities considered essential in meeting the services' military objectives, such as physical fitness facilities and libraries, as Category A, mission-sustaining programs. Mission-sustaining activities are not expected to generate revenues and are supported primarily with appropriated funds. DOD categorized activities that are closely related to supporting military missions, such as outdoor recreation, child care centers and youth activities, as Category B, community support programs. Community support programs are generally able to generate revenues, but also receive some appropriated fund support. Activities in Category C, revenue-generating programs, are as their name suggests business-type activities that can generate enough income to cover most of their operating expenses. Category C programs may receive some minimal appropriated fund support, such as maintenance and repair of real property, but are expected to be primarily self-supporting.

The Senate Committee on Appropriations and the Committee of Conference on DOD's appropriation for fiscal year 1988, reviewed DOD's policy and directed DOD to implement it.[237]

d. Other Issues in Appropriated Fund Support

In addition to direct appropriated fund support, NAFIs also receive support through the unreimbursed use of government employees in their operations. For example, see B-215580, December 31, 1984 where the Army operated a child care center using both appropriated and nonappropriated funds. Appropriated funds were used to pay the salaries of supervisory personnel, apparently employed by the Army, and nonappropriated funds were used to pay the salaries of teachers, food service workers and other subordinate personnel, apparently employed by the NAFI.

In B-192859, April 17, 1979, the Comptroller General considered whether the Army could reimburse a NAFI for services provided. The NAFI in question, a consolidated post housing fund, provided maid and custodian services, yard cutting and watering services, maintenance of roads, snow removal and general policing services for common use areas in post housing. Although the Army was responsible for providing those services, it did not. The NAFI decided to provide the services and pay for them by charging the housing residents. Later, the NAFI decided to bill the Army for those services and seek reimbursements from the Army for the residents. The Comptroller General stated that without specific statutory authority, appropriated funds are not available to support activities of a nonappropriated fund instrumentality. Since most of the services provided were actually the Army's responsibility rather than the responsibility of the NAFI, the NAFI could be partially reimbursed. The decision noted that obtaining services from a NAFI is tantamount to obtaining them from a nongovernmental source and that regular purchase orders should be used. In that case, the documents prepared and actions taken by the Army and the NAFI did not create a binding contract and no binding obligation on the Government was created. For those services for which the Army was responsible and had received the benefit of the services, the NAFI could be reimbursed on a quantum meruit basis, if ratified by a contracting official of the Army. For those services that were not the

[237]S. Rep. No. 100-235, at 60-1 (1987); H.R. Rep. No. 100-498, at 518-19 (1987).

responsibility of the Army, the NAFI could not be reimbursed with appropriated funds.

A related issue affecting NAFIs is the proper disposal or deposit of receipts from the sale of NAFI property or resulting from NAFI operations. In B-156167, July 18, 1967, the Navy asked whether the proceeds from a contemplated sale of the Naval Academy dairy farm could be credited to the Midshipmen's Store Fund. The dairy farm was originally purchased using an advance of appropriated funds to be repaid to the Treasury. While the NAFI remained obliged to eventually reimburse the Treasury for the advanced funds, once the funds had been advanced, they became NAFI funds and the farm, NAFI property. Thus, the sale of the farm realized a gain for the NAFI that had nothing to do with its debt to the Treasury. The proceeds of the sale could be credited to the NAFI. Id.

A different result is obtained when the proceeds of a transaction derive not from NAFI operations, but from official business of the Government. The Miscellaneous Receipts Act (as discussed in Chapter 6 of this work) requires Government officials receiving money for the use of the United States to deposit the money in the Treasury. 31 U.S.C. § 3302(b). In Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992), the Air Force awarded a contract to a commercial air carrier to provide passenger and cargo service to a remote base in the Aleutian Islands. Fares purchased directly or reimbursed by the Government by its personnel, dependents, and contractor employees would provide the carrier's revenue. In return for landing rights and ground support the contractor would pay a "concession fee" (i.e., a rebate) for deposit to the base MWR fund, a NAFI. The court concluded that the Miscellaneous Receipts Statute requires the deposit of funds to the Treasury and there was no authority in this case to divert those funds to an MWR fund. Id. at 421.

In Scheduled Airlines Traffic Offices, Inc. v. Department of Defense, 87 F.3d 1356 (D.C. Cir. 1996) (SATO), the Defense Construction Supply Center, a DOD agency, awarded a commercial travel office contract requiring the contractor to offer both official (government business) and unofficial (personal travel for government employees and dependents) travel services. The contractor was required to pay the government concession fees on both official and unofficial travel. Concession fees for official travel were deposited to the

Treasury and fees for unofficial travel were deposited to the local MWR fund, a NAFI. The travel agency, SATO, had bid unsuccessfully on similar contracts in the past. Through informal channels, it learned that the agency made its award determinations "largely to maximize payments to the local Morale Funds." Id. at 1358. Realizing that the agency planned to continue its previous award policies, SATO sought an injunction to force the agency to change its policy. Among other things, SATO claimed that the Miscellaneous Receipts Statute did not permit the deposit of the concession fees into MWR funds, but compelled their deposit into the Treasury. The Government argued that this contract was different from the one in the Reeve Aleutian: The concession fees were derived solely from unofficial travel paid for by private funds and were not government funds.

The Court of Appeals for the District of Columbia Circuit concluded that the fees were government funds. The travel agents paid them in consideration for government resources, such as the right to occupy agency space, utilize government services associated with the space and serve as an exclusive on-site travel agent. SATO, 87 F.3d at 1362. Since the Miscellaneous Receipts Statute requires the deposit into Treasury of "money for the Government from any source," the government's argument about the private source of funds was rejected. The SATO Court noted that the concession fees were derived from procurements administered by a government agency in which the Morale Fund played no role. Id. at 1363. The Court observed that "not only does the travel scheme at issue here divert to Morale Funds revenues that should be deposited in the Treasury, but it also creates incentives for government officials to reduce even those funds that are deposited in the Treasury." Id. Depositing the fees into MWR funds violated the Miscellaneous Receipts Act. Id. The decision left open the question of whether unofficial travel concession fees could be retained by an MWR fund if a NAFI administers the contract. The decision also may have other potential implications for revenues generated by NAFIs that are supported in any manner or at any level by the government.

e. Borrowing by Nonappropriated Fund Activities

GAO has determined that NAFIs have the authority to borrow funds from commercial sources. In B-148581-O.M., December 18, 1970, GAO found that no federal law specifically prohibited AAFES (the military post exchange NAFI in question) from borrowing funds. GAO observed that the general laws governing borrowing by the

United States, the use of appropriated funds and other financial transactions of the government have not been applied to NAFIs. Moreover, the United States is not a party to nor is it legally bound or obligated by the financial transactions of NAFIs, notwithstanding their status as federal instrumentalities immune from state taxation. GAO had previously noted that an Army regulation authorizes the borrowing of funds by post restaurants. 9 Comp. Gen. 411 (1930). Then current DOD regulations granted AAFES implied authority to borrow funds from private sources and such authority was considered a normal practice for a business operation like AAFES. B-148581-O.M., December 18, 1970. However, GAO emphasized that such loans could not be on the credit of the United States.

4. Transactions with Federal Agencies

Since they are so closely involved with the Federal Government, it is not surprising that NAFIs and the agencies they are associated with want to enter into transactions for the provision of goods and services. This section addresses these practices and the legal authority for such transactions.

a. Economy Act and Intra-Agency Orders

As a general matter, the federal government is one entity (or "person") for legal purposes. So, when agencies wish to obtain items or services from one another, they do not enter into contracts per se—a person can't contract with himself, or so theory holds. One source of authority for agencies to obtain services from one another is by entering into reimbursable interagency agreements under the Economy Act. 31 U.S.C. § 1535. However, although NAFIs are instrumentalities of the United States Government, the Economy Act does not apply to nonappropriated fund activities. 64 Comp. Gen. 110 (1984) (Department of Agriculture Graduate School, a NAFI, could not enter into Economy Act agreement with a federal agency); 58 Comp. Gen. 94 (1978) (Army and NAFIs could not enter into intra-agency orders for services provided to Army).

The Comptroller General explained the rationale for this result in 58 Comp. Gen. 94 which involved the Army's use of intra-Army orders for obtaining goods and services from NAFIs. GAO emphasized that the Economy Act authority involves the transfer of moneys from one appropriation account to another for services provided. In the case of a NAFI, by definition, the transfer would not involve an appropriation account. (While part of the Government, NAFIs are not federal agencies and don't have appropriated fund accounts.) Recognizing their connection to the Government, the Comptroller General noted that "they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriation requirements" and he believed that it was those differences, rather than their status as Government instrumentalities, which were controlling. 58 Comp. Gen. at 97. The Comptroller General further noted that Congress has no direct control, through appropriations, over the accounts of the nonappropriated fund activities (and neither did GAO, through its account settlement authority). Thus, obtaining goods and services from a nonappropriated fund activity is "tantamount to obtaining them from non-Governmental, commercial sources." Id. at 98.

Similarly, when considering the use of inter-agency agreements between federal agencies and the Graduate School of the Department of Agriculture, the Comptroller General again determined that the Economy Act did not apply to nonappropriated fund instrumentalities. 64 Comp. Gen. at 113, (Decision also concluded that the Government Employees Training Act, 5 U.S.C. § 4104, did not constitute authority for inter-agency agreements between federal agencies and nonappropriated fund activities for the same reasons).

b. Contracting to Sell Goods and Services to Agencies

Although obtaining goods and services from NAFIs is "tantamount to obtaining them from non-Governmental, commercial sources," the Comptroller General has questioned whether it is appropriate for them to provide services to federal agencies at all—noting that NAFIs exist to help foster the morale and welfare of military personnel and their dependents. 58 Comp. Gen. 94, 98 (1978). Providing the Department of Defense with goods or services to carry out its regular operating activities is not directly related to that purpose. Thus, the Comptroller General would normally view the sale of goods and services by NAFIs to regular governmental operating activities to be outside the scope of the NAFIs proper functions. Accordingly, the Comptroller General opined that, as a general rule, there should be no competition between nonappropriated fund activities and commercial sources simply because NAFIs normally sell to military personnel, not government agencies. Id.

However, there are circumstances in which agencies and NAFIs do engage in the exchange of goods and services and there may be situations where procurement through a nonappropriated fund activity might be proper. For example, where it is impracticable for an agency to obtain goods or services from sources other than NAFIs, or where only a NAFI could provide the urgently required goods or services. 58 Comp. Gen. at 98. Perhaps, even a sole source contract might be proper. Id.; B-235742, April 24, 1990 (proposed sole-source award to nonappropriated fund activity for lunchroom monitoring services at Department of Defense dependent schools was proper). On the other hand, in 58 Comp. Gen. 94, it was improper for a nonappropriated fund activity to provide mattresses to the Army, but GAO did not have enough information on the record to determine whether the provision of janitorial and dry-cleaning services was also inappropriate.

Subsequently, the Comptroller General has stated broadly that NAFIs may compete to provide goods or services to agencies in the competitive procurement process without addressing whether exigent, urgent circumstances existed or whether it was impracticable for a source other than a NAFI to provide the goods. 68 Comp. Gen. 62, 66 (1988) (Department of Agriculture Graduate School may compete in competitive procurement for operation and maintenance of a federal agency's training laboratory); 64 Comp. Gen. 110, 111-12 (1984) (Department of Agriculture Graduate School may be an appropriate recipient of sole source or competitive contract for training of federal employees); B-215580, December 31, 1984 (Army could not purchase child care services from nonappropriated fund activity via intra-agency order, but could use a regular purchase order). The Comptroller General has also stated that "a NAFI may compete in, and be awarded a contract under a competitive procurement unless otherwise precluded by its charter from doing so." 64 Comp. Gen. at 112; B-274795 January 6, 1997.

Sole-sourcing, however, is another matter. In one case, the Army wanted to purchase "health and comfort kits" (shampoo, razors, chewing gum and shoe polish) for soldiers in Korea from the Army and Air Force Exchange Service on a sole-source basis. B-190650, September 2, 1980. GAO noted that the Army had not alleged that other sources were not capable of furnishing the items (nor could it make that statement since other sources were currently providing the items) and held that the fact that a NAFI is able to perform a contract with greater ease or at less cost than any other concern does not justify a non-competitive procurement. Id. See also

58 Comp. Gen. at 98-99. ("In such cases, appropriate sole-source justifications should be prepared.").

Where nonappropriated fund activities provided services to federal agencies under inter or intra-agency orders later found to be improper, GAO has allowed the activities to be reimbursed on a quantum meruit or quantum valebant basis, if ratified by an authorized contracting official. 58 Comp. Gen. 94, 100 (1978); B-199533, August 25, 1980; B-192859, April 17, 1979.

c. Authority under 10 U.S.C. § 2482a

Congress has recently provided statutory authority for certain nonappropriated fund activities to enter into contracts and agreements with other Federal agencies or instrumentalities.

In 1990, Congress authorized the Graduate School of the Department of Agriculture to enter into agreements to provide training and other services incidental to training to Federal agencies under the provisions of the Economy Act.[238]

As part of the 1997 National Defense Authorization Act,[239] Congress authorized agencies and instrumentalities of the Department of Defense that support operation of the exchange system, or a morale, welfare and recreation system to enter into contracts or other agreements with other Federal agencies or instrumentalities. That statute specifically provides:

> "An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system." Pub. L. No. 104-201, supra note 239.

Congress noted that exchanges and the MWR programs need to become more efficient, and determined that this could be achieved

[238]Pub. L. No. 101-624, § 1669, 104 Stat. 3359, 3768 (1990), codified at 7 U.S.C. § 5922(a).

[239]Pub. L. No. 104-201, Div. A, tit. III, § 341(a)(1), 110 Stat. 2488 (1996), codified at 10 U.S.C. § 2482a.

by permitting contracting between those activities and federal agencies. H.R. Rep. No. 104-563 at 278 (1996), reprinted in 1996 U.S.C.C.A.N. 2948, 2989.

5. Nonappropriated Fund Contracting

Obviously, NAFIs have to procure goods and services for MWR programs. This section addresses the applicable procurement policies and procedures.

a. Federal Procurement Laws and Regulations

As a general rule, the procurement laws and regulations applicable to the federal government do not apply to nonappropriated fund instrumentalities because these laws generally apply to federal agencies or contracts for the government and NAFIs do not fall within either category.

41 U.S.C. § 5—This law specifies that, subject to other authority or stated exceptions, "purchases and contracts for supplies or services for the government may be made or entered into only after advertising a sufficient time previously for proposals." 41 U.S.C. § 5. As we have discussed, NAFI contracts are made for the benefit of government officers or employees in their individual personal capacity, not in their official capacity, and not for the operations of the government.

Competition in Contracting Act—The Competition in Contracting Act of 1984 (CICA)[240] made several changes to procurement provisions, including GAO's bid protest authority (which we will discuss later). Its applicability depends on the definition of "federal agency" found in the Federal Property and Administrative Services Act, 40 U.S.C. § 472. Federal agency includes an executive branch agency. 40 U.S.C. § 472(b). An executive branch agency includes any executive department or independent establishment, including wholly-owned government corporations. 40 U.S.C. § 472(a). However, it does not include nonappropriated fund instrumentalities which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not federal agencies. B-270109, February 6, 1996; B-228895, December 29, 1987.

[240]Pub. L. No. 98-369, Title VII, 98 Stat. 494, 1175 (1984).

Armed Services Procurement Act of 1947—Although many NAFIs are related to the Department of Defense, where appropriated funds are not directly involved, the Armed Services Procurement Act and armed services and defense acquisition regulations do not apply. Ellsworth Bottling Company v. United States, 408 F. Supp. 280 (W.D. Okla. 1975); 58 Comp.Gen. 94, 98 (1978). See also 10 U.S.C. § 2303(a) (chapter applies to procurements for which payments are to be made from appropriated funds).

Federal Property and Administrative Services Act of 1949—As discussed under the CICA provisions, NAFIs are not “federal agenc[ies]” for purposes of the Federal Property and Administrative Services Act of 1949 (FPASA). Also, the provisions of the FPASA would not apply to military NAFIs since section 302 of the FPASA excludes defense agencies from the provisions of title III of that Act. 41 U.S.C. § 252(a) (1982). See 66 Comp. Gen. 231, 235 (1987). Ellsworth Bottling Co. v. United States, 408 F. Supp. 280, 283-84 (1975). (Army and Air Force Exchange Service (AAFES) is not subject to the FPASA as it is part of the Departments of Army and Air Force and is not an executive department or independent establishment).

Federal Acquisition Regulation—The Federal Acquisition Regulation (FAR), the government wide regulation which implements the Federal Property and Administrative Services Act, applies to federal agencies and acquisitions with appropriated funds. This would not include NAFI procurements with nonappropriated funds. 48 C.F.R. 2.101. However, there are circumstances in which appropriated funds are used for NAFI purchases. In those situations, the FAR and applicable agency regulations apply to the purchase. See, e.g., Army Regulation 215-1, para. 7-34. For example, when nonappropriated funds are used for NAFI contracting, Army regulations apply. Army Regulation 215-1, para. 7-34 and Army Regulation 215-4.

b. Use of Federal Agency Procurement Process

Although NAFIs are not required to use the federal procurement process for their nonappropriated fund procurements, in some cases federal agencies conduct procurements on their behalf. For example, for Army NAFIs, Army regulations provide that appropriated fund contracting officers will award and administer NAFI contracts in excess of $25,000 and may award and administer NAFI contracts regardless of dollar amount if the NAFI contracting office cannot. Army Regulation 215-4, para. 1-7(a). However, since the decision in Scheduled Airlines Traffic Offices, Inc. v. Department of Defense,[241] discussed previously, there are open questions as to whether the Government should administer NAFI contracts and other potential implications for revenues generated by NAFIs that are supported in any manner or at any level by the Government.

6. Debts Due Nonappropriated Fund Activities

Despite their close association with the government, debts owed nonappropriated fund activities are not debts owed the United States. Kenny v. United States, 62 Ct.Cl. 328 (1926). Until recently, this had a profound impact on the debt collection tools available to NAFIs. For example, Thomas Kenny was an Army officer assigned to serve as superintendent of a post exchange. A post exchange civilian employee lost post exchange receipts in the amount of $2,557.60. Superintendent Kenny was ultimately held responsible for payment of the amount not recovered and the amount was withheld from his pay. The court held that the receipts of a post exchange were not the property of the United States, the superintendent was not in arrears to the United States, and therefore, the loss could not be deducted from his statutory pay as an Army officer. Kenny, 62 Cl. Ct. 328.

Similarly, in 43 Comp. Gen. 431 (1963), GAO held that a debt owed to a nonappropriated fund activity could not be set off against an enlisted member's final pay because it did not constitute a debt to the United States. The result was the same in B-170400, September 21, 1970, where GAO held that a debt owed by a former employee of the Defense Supply Agency to a nonappropriated fund activity could not be set off against his final compensation or the amount to his credit in the Civil Service Retirement Fund. B-170400, February 2, 1971 (reaffirming the holding in B-170400, September 21, 1970).

Various federal laws, including the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996, 31 U.S.C. ch. 37, provide federal agencies, including instrumentalities of the government, with methods to collect their debts, such as salary offset and administrative offset of monies otherwise payable to debtors. The

[241] 87 F.3d 1356 (D.C. Cir. 1996).

Debt Collection Improvement Act of 1996 amended the terms "claim" or "debt" to include "expenditures of nonappropriated funds." NAFIs also have recourse to other federal collection resources. For example, section 1007 of title 37 of the United States Code authorizes the Department of Defense to collect debts owed by service members to its instrumentalities, including nonappropriated fund instrumentalities, by deducting that amount from the member's pay in monthly installments.

Courts have held that for purposes of setoff under the Bankruptcy Code, where a debtor to a NAFI is owed a refund from the IRS, the refund may be set off against a debt owed to the nonappropriated fund activity. In Re Hanssen, 203 B.R. 149 (Bankr. E.D. Ark. 1996).

7. Nonappropriated Fund Activity Property

While a NAFI is not a federal agency and in many cases is not supported by appropriated funds, its property is under government control. 40 Comp. Gen. 587 (1961). This case involved the commercial aircraft purchased by "military aero clubs" or "flying clubs", nonappropriated fund activities which provide flying instruction, practice and recreation for active duty and retired military personnel, Department of Defense civilian personnel, their families and other personnel designated by the Department of Defense. GAO held that the aero club, as a nonappropriated fund instrumentality, owned and used equipment in its capacity as a government enterprise and may own and use property and equipment only in that capacity. Thus, GAO concluded that commercial aircraft purchased by the aero club were to be regarded as government conveyances under government travel regulations and government travelers could be reimbursed for the expenses of their operation in the circumstances specified by those regulations.

In other cases involving their property, the courts have held that nonappropriated fund activities are departments or agencies of the United States for purposes of a statute prohibiting theft of anything of value from the United States or any department or agency thereof. United States v. Towns, 842 F.2d 740 (4th Cir. 1988); United States v. Sanders, 793 F.2d 107 (5th Cir. 1986).

8. Management of Nonappropriated Fund Activities

a. Regulation and Oversight

Traditionally, since nonappropriated fund activities were generally created by agencies, those agencies also provided for their operations and carried out their oversight by regulation. As with other issues involving nonappropriated fund activities, the Department of Defense's extensive regulations are the best examples of this process of administrative regulation and oversight.[242] These regulations cover everything from the creation of nonappropriated fund activities, their purpose, funding, contracting, employment, audits, financial management, property management, to their dissolution.

Congress has also approved regulations of nonappropriated fund activities, required specific departments to regulate such entities and imposed specific requirements by statute. For example, by Act of March 2, 1821, 3 Stat. 615, Congress approved the General Regulations for the Army which contained specific regulations regarding sutlers. Under 10 U.S.C. § 2783, the Secretary of Defense is required to establish regulations for nonappropriated fund instrumentalities governing the purposes for which nonappropriated funds may be expended and the financial management of such funds to prevent, waste, loss or unauthorized use. Section 2783 also establishes penalties for violations of the financial management regulations for civilian employees of the Department of Defense and members of the armed forces. Under 10 U.S.C. § 136, Congress established the position of the Under Secretary of Defense for Personnel and Readiness who is to perform duties which include

[242] See, for example: (1) Department of Defense Directive, Establishment 1015.1, Management, and Control of Nonappropriated Fund Instrumentalities, August 19, 1981; (2) Department of Defense Directive 1015.8, DoD Civilian Employee Morale, Welfare, and Recreation Activities and Supporting Nonappropriated Fund Instrumentalities, October 22, 1985; (3) Financial Management Regulation DOD 7000.14-R, Vol. 13, Nonappropriated Funds Policy and Procedures, August 1994; (4) Army Regulation 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, September 29, 1995; (5) Department of Defense Directive 1015.2, Military Morale, Welfare, and Recreation, June 14, 1995; Army Regulation 215-4, Morale, Welfare, and Recreation: Nonappropriated Fund Contracting, October 10, 1990.

exchange, commissary and nonappropriated fund activities. Under 10 U.S.C. § 4779, 9779, Congress specified that no money appropriated for the support of the Army and the Air Force, respectively, may be spent for exchanges, but added that this does not prevent exchanges from using public buildings or public transportation that are not needed for other purposes.

b. Authority to Audit NAFIs

(1) GAO Jurisdiction

A 1975 law authorized GAO to audit the operations and accounts of nonappropriated fund activities authorized or operated by the head of an executive agency to sell goods or services to government personnel and their dependents.[243] Several questions came up regarding what type of NAFIs were covered under this authority. In an internal memorandum answering these questions, GAO made several points. B-167710-O.M., May 6, 1976. First, GAO explained that the scope of the audit authority was not intended to apply to every nonappropriated fund activity since "the primary responsibility should rest with the operating agencies concerned." GAO pointed out that the 1974 Act listed the military and NASA exchanges and similar entities as examples of the types of NAFIs to be audited under this authority.[244] Since GAO could not identify a workable definition of a NAFI, it relied on the case law and statutes dealing with NAFI operations to identify the applicable elements used for determining whether a particular activity is a NAFI.[245]

Under the 1975 Act, the Comptroller General may also audit the accounting systems and internal controls of NAFIs as well as

[243]Pub. L. No. 93-604, § 301, 88 Stat. 1962 (1975), codified at 31 U.S.C. § 3525.

[244]In the recodification of this provision in Pub. L. No. 97-258, 96 Stat. 963 (1982), the words "military or other . . . such as the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, Exchange Councils of the National Aeronautics and Space Administration, commissaries, clubs, and theaters" were omitted as surplus.

[245]These elements include whether: (1) the activity was established under the authority or sanction of a Government agency with or without an initial advance of Government funds; (2) the activity is created and run by Government officers or employees and/or their dependents; (3) the activity is operated for the benefit of Government officers or employees and/or their dependents; and (4) the operations of the activity are financed by the proceeds therefrom rather than by appropriations. B-167710-O.M., May 6, 1976.

internal or independent audits or reviews of those funds. 31 U.S.C. § 3525(a)(1)-(3). In order to carry out this authority, records and property of NAFIs are to be made available to the Comptroller General. 31 U.S.C. § 3525(c). The Comptroller General is also authorized to audit NAFIs which receive income from vending machines on Federal property and has access to any records necessary to conduct such audits. 20 U.S.C. § 107b-3.

(2) Other Auditors

GAO has also concluded that the Secretary of Defense was authorized by statute and regulations to require DOD internal auditors to audit NAFIs. B-148581.14-O.M., August 17, 1976. Military audit agencies or certified public accountants may audit NAFIs in accordance with DOD regulations and instructions. DOD Instruction No. 7600.6 (Audit of Nonappropriated Fund Instrumentalities and Related Activities); Army Regulation No. 215-1, para. 13-2.

(3) Settlement of Accounts

Under 31 U.S.C. § 3526 (formerly 31 U.S.C. §§ 71, 72, 74), the Comptroller General is authorized to adjust and settle the accounts of the United States Government and to certify balances in the accounts of accountable officers. Under its account settlement authority, the Comptroller General can take exception to an improper transaction and hold the certifying or disbursing officer personally liable for the amount of money erroneously or improperly expended. 62 Comp. Gen. 40, 41 (1982). GAO can exercise its account settlement authority over government agencies, departments or independent establishments. While the General Accounting Office Act of 1974 provided GAO with audit authority over nonappropriated fund activities, it did not provide account settlement authority for them. B-183034, April 18, 1975; B-187004, August 12, 1976. In one case in which a bid protest decision was sought from GAO concerning a NAFI procurement, GAO replied that it could not consider the matter under its account settlement authority, but it would retain the correspondence for audit consideration. B-186542, June 17, 1976.

(4) Bid Protests

Prior to the enactment of the Competition in Contracting Act,[246] GAO's account settlement authority was also the basis for its bid protest jurisdiction. Stated slightly differently, GAO viewed its authority to consider protests of contract awards as an extension of its authority to settle appropriated funds accounts of the Government. B-185084, November 28, 1975. The fact that an agency labeled funds as nonappropriated was not determinative of whether GAO exercises jurisdiction over a bid protest. For example, 57 Comp. Gen. 311 (1978) involved the protest of a procurement for the design and construction of a commissary which was to be paid from a trust revolving fund account in which commissary surcharges were deposited. Originally, GAO had been advised that these funds were nonappropriated. Since its bid protest jurisdiction was based upon its authority to settle appropriated funds accounts, GAO dismissed the protest. B-188770, April 14, 1977. Upon reconsideration, GAO determined that the commissary surcharge funds were appropriated funds because Congress had authorized the collection of the surcharge and its use for commissary construction. GAO noted that this was consistent with its prior analysis that statutes authorizing the collection and credit of fees to a particular fund and making the fund available for specified expenditures constituted appropriations of funds. 57 Comp. Gen. at 313. Since these were in fact appropriated funds, GAO did have account settlement authority for the funds and bid protest jurisdiction for the protest. Id. at 315.

Since the enactment of the Competition in Contracting Act, GAO's jurisdiction over bid protests is no longer based upon its account settlement authority; rather it is limited to procurements by federal agencies as defined in the Federal Property and Administrative Services Act of 1949.[247] The definition of federal agency includes an executive branch agency. 40 U.S.C. § 472(b). The definition of an executive branch agency includes any executive department or independent establishment, including wholly-owned government corporations. 40 U.S.C. § 472(a). However, it does not include

[246] 31 U.S.C. §§ 3551-3556.

[247] 40 U.S.C. § 472.

nonappropriated fund instrumentalities which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not, in that sense, federal agencies. B-270109, February 6, 1996; B-228895, December 29, 1987.

This does not mean that GAO will never consider a protest involving a procurement by a nonappropriated fund instrumentality. GAO will review a NAFI procurement where it finds that the NAFI is acting as a conduit for the federal agency to circumvent applicable procurement statutes. In 73 Comp. Gen. 213 (1994), GAO considered a protest concerning a procurement by an employees' association, a nonappropriated fund instrumentality. The protester alleged that the agency was diverting its needs for procurement of vending machines to the NAFI in order to avoid applying procurement statutes and regulations. Id. at 215. However, the protester must show that the nonappropriated fund instrumentality is acting as a conduit for the agency in order to circumvent procurement statutes or GAO will decline to exercise its jurisdiction. B-270109, February 6, 1996. That GAO considers the protest upon that showing does not guarantee the protester's success; the facts must support the allegation. In 73 Comp. Gen. 213, GAO determined that the agency was not, in fact, diverting the procurement of vending machine services needed by the agency to the nonappropriated fund instrumentality and denied the protest.

The fact that an agency will receive some incidental benefit from a NAFIs' procurement does not confer bid protest jurisdiction on GAO. B-270109, February 6, 1996. In B-270109, the protester argued that GAO should consider its protest because government agencies were going to receive benefits from the services to be procured and, as such, their appropriations would be improperly augmented. GAO determined that even though government agencies were going to benefit to some extent from the services procured, that benefit was incidental to the fundamental purpose of the procurement which was to provide personal, unofficial telecommunications services arranged by the nonappropriated fund instrumentality. Id.

9. Sovereign Immunity

As federal instrumentalities, nonappropriated fund activities are subject to and entitled to various duties and privileges of the federal government. One of these is the principle of sovereign immunity:

The United States, as "sovereign," cannot be sued without its consent.

a. Immunity From State and Local Taxation

Under the doctrine of sovereign immunity, the federal government of the United States is immune from taxation by the States; a principle recognized by the Supreme Court in M'Culloch v. Maryland, 17 U.S.(4 Wheat.) 316 (1819). This constitutional immunity extends to protect federal instrumentalities, including nonappropriated fund instrumentalities. Standard Oil v. Johnson, 316 U.S. 481, 485 (1942). This immunity prohibits a state taxing authority from imposing a markup on the purchases of federal nonappropriated fund instrumentalities. United States v. State Tax Commission of the State of Mississippi, 421 U.S. 599, 604-05 (1975). This is so even where that markup is not collected directly from the nonappropriated fund instrumentality, but is collected by suppliers. Id. at 608-09.

The United States may consent to state taxation of its instrumentalities. Under the Hayden-Cartwright Act, Congress permits collection of state taxes on gasoline and other fuels sold through post exchanges and other retail sales agencies of the federal government on military installations when such fuels are not for the exclusive use of the United States. 4 U.S.C. § 104. Under the Buck Amendment to the Hayden-Cartwright Act, Congress permitted states to levy taxes within federal areas to the same extent as though the area were not a federal area, with certain exceptions not relevant here. 4 U.S.C. § 105-107.[248]

b. Immunity From Suit

Although nonappropriated fund activities are instrumentalities of the United States Government, the courts have traditionally held that suit will not lie against the United States to enforce NAFI contractual obligations. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966); Keetz v. United States, 168 Ct. Cl. 205 (1964); Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958); Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953). The most famous of these decisions, the Borden case, involved a chief accountant employed by the American

[248]This also had the effect of removing any immunity previously enjoyed by private concessionaires located on military installations since they are not instrumentalities of the United States. Castlen, supra note 224, at 11 n.69.

Army Exchange Service. He brought suit against the United States to recover salary withheld to recoup the loss of money stolen from a safe at the post exchange. Mr. Borden had contracted with the American Army Exchange Service to serve as a senior accountant. His contract stipulated that the employer could withhold salary for claims against him on account of fraud, breach of contract, or negligence. Army regulations regarding nonappropriated fund activities stated that: "Exchange contracts are solely the obligation of the exchange. They are not Government contracts and the distinction between exchange contracts and Government contracts will be observed and clearly indicated at all times." Id. at 877.

The Court of Claims held that, under the Standard Oil decision,[249] Mr. Borden could not sue the Exchange Service because it was part of the Government and the Government had not consented to a suit against the Exchange Service. Id. In addition, Mr. Borden was precluded from suing the Government because exchange contracts were not contracts of the United States and the United States was not liable on such contracts. Id.

The unfair result in this case was not lost on the Court of Claims. The fact that Mr. Borden did not have a suit against the Exchange Service, let alone the United States, was one thing; the fact that the Court of Claims found that Mr. Borden had not been negligent in connection with the loss was quite another. The court put its concerns this way:

> "The Army officers are given complete supervision of these Post Exchanges. They handle the money. They have control of the funds. The funds are used to make the Army more effective. In other words the officers run the show. The Exchanges are established and maintained for the benefit of Army personnel. That is their major, in fact their sole purpose. Even the civilian employees are subject to the Articles of War. For the Army to contend and to provide by regulation that it is not liable since it did not act in its official capacity would be like a man charged with extra-marital activity pleading that whatever he may have done was done in his individual capacity and not in his capacity as a husband.
>
> ". . . .
>
> "We think it is proper that this situation should be called to the attention of the Congress. It seems fair that either the Post Exchanges or the Government should be

[249] Standard Oil v. Johnson, 316 U.S. 481 (1942).

subject to suit and liable for any breach of contract that had been duly signed by the Army Exchange Service." Id. at 877-78.

Some civilian NAFIs have benefitted from this same paradox. For example, several courts have held that Post Office employee welfare committees constitute integral parts of the Postal Service and were instrumentalities of the United States immune from suit without the United States' consent. Automatic Retailers v. Ruppert, 269 F. Supp. 588 (S.D. Ia. 1967); Employees Welfare Committee v. Daws, 599 F.2d 1375 (5th Cir. 1979).

In response to these decisions, Congress in 1970 amended the Tucker Act to waive sovereign immunity for claims arising from post exchange contracts. The amendment to the Tucker Act provided that express or implied contracts with the specified nonappropriated fund instrumentalities are considered express or implied contracts with the United States. Pub. L. No. 91-350, 84 Stat. 449 (1970). However, that waiver of sovereign immunity only applied to the NAFIs specifically designated in the amendment to the Tucker Act.[250] See McDonald's Corp. v. United States, 926 F.2d 1126, 1132-1133 (Fed. Cir. 1991); Denkler v. United States, 782 F.2d 1003, 1007 (Fed. Cir. 1986); Hopkins v. United States, 513 F.2d 1360, 1363 (Ct. Cl. 1975). See also Research Triangle v. Board of Governors of the Federal Reserve System, 962 F. Supp. 61 (M.D.N.C. 1997); Wolverine Supply, Inc. v. United States, 17 Cl.Ct. 190 (1989). The purpose of the amendment was to afford contractors a federal forum in which to sue nonappropriated fund instrumentalities by "doing away with the inequitable 'loophole' in the Tucker Act." United States v. Hopkins, 427 U.S. 123, 126 (1976).

c. Payment of Judgments

Assuming a party overcomes the jurisdictional barriers to suing a NAFI and prevails in the action, who pays the judgment? One of the most commonly cited principles regarding NAFIs is that the United

[250] As originally proposed, the amendment would have applied to all nonappropriated fund activities. It was changed to include only contracts of certain Department of Defense and other nonappropriated fund activities specifically named in the amendment. Some government agencies protested that certain activities that operated incidentally to them, like bowling leagues or baseball teams, should not be covered by the amendment. Congress decided to include only those military activities which would have sufficient assets to pay costs resulting from the expanded jurisdiction. H.R. Rep. No. 91-933, at 6-7 (1970), reprinted in 1970 U.S.C.C.A.N. 3477, 3482.

States "assumes none of the financial obligations" of NAFIs. Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942). The same is true of judgments against NAFIs. This topic is covered in detail in chapter 14 of this work so we will only summarize the highlights here.

NAFIs generally pay tort judgments against them from nonappropriated funds. They may not use appropriated funds and have no access to the permanent indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304. See B-204703, September 29, 1981. See also Mignogna v. Sair Aviation, Inc., 937 F.2d 37 (2nd Cir. 1991).

Contract judgments on express or implied contracts by the NAFIs covered in the Tucker Act are paid initially from the Judgment Fund, which is then reimbursed by the contracting activity, i.e., the NAFI. 31 U.S.C. § 1304(c). The Tucker Act and the applicable provisions of the Judgment Fund only apply to the specified NAFIs, not other nonappropriated fund activities. Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971).

10. Status of Nonappropriated Fund Activity Employees

Nonappropriated fund activities pay their employees primarily from income generated by the activities themselves. Perez v. AAFES, 680 F.2d 779, 780 (D.C. Cir. 1982). Employees of nonappropriated fund activities are neither employees of federal agencies, nor employees of the United States Government. Rather, they are employees of the instrumentality. United States v. Hopkins, 427 U.S. 123, 127 (1976). Congress never intended that nonappropriated fund activity employees receive the same level of protection as other federal employees. McAuliffe v. Rice, 966 F.2d 979, 980 (5th Cir. 1992). When Congress passed the Act of June 19, 1952, Ch. 444, § 1, Pub. L. No. 82-397, 66 Stat. 138, Congress acceded to the Department of Defense's desire to make civilian employment of nonappropriated fund activities as flexible as possible and not subject to then existing Civil Service type protections. The 1952 Act provided that employees of nonappropriated fund activities "shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission."[251] Id. Where Congress has made nonappropriated fund activity employees subject to laws applicable to other federal employees, it has done so by expressly including them within the coverage of specific statutes. See Perez, 680 F.2d at 787.

a. Applicability of Civil Service Laws

Nonappropriated fund employees are generally not deemed to be employees of the United States except as specifically provided by statute. 5 U.S.C. § 2105(c). Section 2105(c) provides:

> "An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of —
>
> "(1) laws administered by the Office of Personnel Management, except —
>
> "(A) section 7204;
>
> "(B) as otherwise specifically provided in this title;
>
> "(C) the Fair Labor Standards Act of 1938;
>
> "(D) for the purpose of entering into an interchange agreement to provide for the noncompetitive movement of employees between such instrumentalities and the competitive service; or
>
> "(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or
>
> "(2) subchapter I of chapter 81, chapter 84 (except to the extent specifically provided therein), and section 7902 of this title."

The final sentence of 5 U.S.C. 2105 (c) states that it does not affect the status of the specified NAFIs as Federal instrumentalities.

[251]The 1952 Act is recodified at 5 U.S.C. § 2105(c) and incorporated within the Civil Service Reform Act of 1978.

(1) Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 and the Supreme Court in United States v. Fausto, 484 U.S. 439 (1988), streamlined and simplified the remedies available to federal employees for adverse employment actions. McAuliffe v. Rice, 966 F.2d 979, 981 (5th Cir. 1992). The Civil Service Reform Act of 1978 created a comprehensive framework providing substantive and procedural rights and remedies for federal employees for performance actions, removals or other adverse actions.[252] In Fausto, the Supreme Court held that the Civil Service Reform Act was the exclusive substantive and procedural framework for federal employee actions, and precluded judicial review of an employee's action under other laws. To conclude otherwise, said the Court, would allow such claims to undermine the goals of unitary decision making and consistency intended by the Act. Thus, the Supreme Court held that the Civil Service Reform Act precluded an employee who otherwise did not qualify for review under the Act from bringing a claim under the Back Pay Act.

Congress deliberately exempted nonappropriated fund activity employees from federal civil service rules. This enabled the armed forces to carry out the missions of nonappropriated fund activities with the maximum possible personnel flexibility. McAuliffe, 966 F.2d at 981. With a few exceptions, nonappropriated fund activity employees are not covered by laws which apply to employees within the general Federal Service, including the Civil Service Reform Act. McAuliffe, 966 F.2d at 980-981; Perez v. AAFES, 680 F.2d 779 (1982). See 5 U.S.C. § 2105(c). Thus, the remedies available to nonappropriated fund activity employees are established by regulation of the agency employing them. See McAuliffe, 966 F.2d at 981; Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988). Accordingly, nonappropriated fund activity employees are not entitled to appeal adverse actions to the Merit Systems Protection Board. Perez, 680 F.2d at 787; Taylor v. Department of the Navy, 1 M.S.P.R. 591 (1980). In the McAuliffe case, a former civilian employee of a nonappropriated fund activity sought review of the decision to terminate her employment under the Administrative

[252]For a detailed discussion of the Civil Service Reform Act, see United States v. Fausto, 484 U.S. at 443-47.

Procedure Act, 5 U.S.C. § 701 et seq. The court held that the exclusivity of the Civil Service Reform Act precluded judicial review under the Administrative Procedure Act.[253] 966 F.2d 979.

Since they are not covered by the Civil Service Reform Act, nonappropriated fund activity employees have attempted to challenge actions taken against them through other statutory and constitutional rights. These include invoking Tucker Act jurisdiction for certain nonappropriated fund activity contracts, and seeking damages for constitutional deprivations by a government official, as established in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

As we previously discussed, the Tucker Act waives sovereign immunity for claims arising from contracts of certain post exchanges. The Supreme Court has recognized that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services. Id. at 126; AAFES v. Sheehan, 456 U.S. 728, 735 (1982). Relying on this theory, nonappropriated fund activity employees sued their employers alleging that they were employed by contract. Sheehan, 456 U.S. at 735; Moore v. United States, 21 Cl.Ct. 537 (1990); Orona v. United States, 4 Cl.Ct. 81 (1983). However, the courts found that the specific employees in those cases were not, in fact, serving under employment contracts but had been appointed to their positions. Consequently, the courts lacked jurisdiction over their claims. Sheehan, 456 U.S. at 736-37; Moore, 21 Cl. Ct. at 539-40; Orona, 4 Cl. Ct. at 84.

Feeling confused about NAFI's? This next case is not going to make you feel a whole lot better. In Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988), a former AAFES[254] employee sued for damages after he

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[253]But compare Helsabeck v. United States, 821 F. Supp. 404 (E.D.N.C. 1993), in which the District Court held that the Civil Service Reform Act did not preclude judicial review of a claim for nonmonetary damages against the Government by a nonappropriated fund instrumentality employee for procedures used to discharge him. While the court permitted the plaintiff to amend his complaint with respect to nonmonetary claims, it did not specify what the nature of the review would be. There is no subsequent history of the case to determine what, if anything, the plaintiff did as a result, so we are unable to infer what effect this would have on NAFI employee rights.

[254]Army and Air Force Exchange Service.

was fired for making false claims for travel expense reimbursements. The court recognized that AAFES is a NAFI and not technically part of the Government. Thus, AAFES employees were not federal employees with rights under the Civil Service System. Instead, AAFES employees fall under the Army and Air Force regulations. Id. at 581. Based on sovereign immunity, the court dismissed those claims which sought relief from the NAFI, the government, and the individuals who acted in their official capacities to fire the claimant. Id. at 582. The court then dismissed those claims against the individuals acting in their personal capacities,[255] based on Bush v. Lucas, 462 U.S. 367 (1983). See 701 F. Supp. at 583-84.

Bush held that Bivens-type constitutional damage claims could not be brought for alleged constitutional violations associated with a claimant's employment in the federal government. The reason for this was that Congress had established "an elaborate remedial system" which was intended to address employment related claims by federal employees. Bivens-type actions would unduly disrupt that statutory scheme. 462 U.S. at 388.

The Castella court realized that Bush involved federal employees subject to the Civil Service System, not NAFI employees. Castella, 701 F. Supp. at 583. (As we noted earlier, Congress intentionally exempted NAFI employees from that system.) Nevertheless, it noted that some other courts (including its own circuit court) had applied (or endorsed applying) Bush to NAFI employee claims. The courts rationalized their position with the explanation that while the Army and Air Force regulations were not approved by Congress, they were, nevertheless, "an elaborate remedial system" that should not be disrupted by Bivens-style constitutional claims. Castella, 701 F. Supp. at 584.

In other words, by setting up a comprehensive regulation, the Army, Air Force, and AAFES were able to preclude a claimant from pursuing constitutional claims! Strange as it may seem, by treating

[255]In the Bivens case, the Supreme Court held that an individual citizen was entitled to sue for damages for alleged constitutional deprivations by a government official. 403 U.S. 488. The Bivens remedy, it should be noted, runs against the offending official in his private capacity, not against the government. See chapter 14, "Payment of Judgments," supra at 14-21 and 14-23.

NAFI employees the same as federal employees under Bush, the courts may actually have reinforced the congressional intention that NAFI employees be treated differently than federal employees, since absent a Bivens-type claim, the NAFI employees are left more to the regulatory mercy of the agencies than are federal employees under the statutory Civil Service rules.

The Castella court also held that the nonappropriated fund activity employee could not use the Privacy Act challenging the correctness of the records that supported the decision to remove him, to attack the removal decision. The court explained that the purpose of the Privacy Act was to allow for the correction of factual or historical errors. It was not intended to permit a plaintiff to reopen consideration of unfavorable federal agency decisions. The court found that the plaintiff was really alleging only a wrongful personnel decision. Id. at 584-585.

(2) Other Employment Related Laws

The following canvass of laws typically associated with federal employment discusses their applicability to NAFIs.

Whistleblower Protection Act—Nonappropriated fund activity employees are not protected by the Whistleblower Protection Act because they are excluded from the definition of employee for purposes of Title 5. Clark v. Army and Air Force Exchange Service, 57 M.S.P.R. 43 (1993). However, under 10 U.S.C. § 1587, nonappropriated fund activity employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense.

Classification and Pay Rates and Systems—As stated in section 2105(c), nonappropriated fund activity employees are federal employees for purposes of section 7204 which prohibits discrimination because of race, color, creed, sex or marital status against individuals in the classification of employees, administration of pay rates and systems of employees, appointments to positions above GS-15 and the systematic agency review of operations.

Fair Labor Standards Act of 1938—Nonappropriated fund activity employees under the jurisdiction of the Armed Forces fall within the coverage of the Fair Labor Standards Act of 1938. 29 U.S.C.

§ 203(e)(2)(A)(iv). Unlike federal employees in the competitive or excepted service, nonappropriated fund activity employees are under another personnel system pursuant to 5 U.S.C. § 2105(c). Since nonappropriated fund activity employees are not covered by the laws which apply to federal employees, procedural protections for removals or other adverse actions affecting those employees are established by regulation of the agency supervising the NAFI. AFES and AFGE, Region Council 236, 33 F.L.R.A. 815, 817-18 (1988). A claim may be brought against a NAFI since the Government has waived immunity with regard to wage claims under the FLSA. Cosme Nieves v. Deshler, 786 F.2d 445, 450 (1st Cir. 1986) (a FLSA claim does not come within the limited exceptions of the Tucker Act); Morales v. Senior Petty Officers' Mess, 366 F. Supp. 1305 (D.P.R. 1973).

Family and Medical Leave Act of 1993—Nonappropriated fund activity employees are federal employees for purposes of Title II of the Family and Medical Leave Act of 1993. 5 U.S.C. § 2105(c). Title II of the Family Medical Leave Act grants federal employees, including nonappropriated fund employees, rights to leave from work in enumerated circumstances, but no private right of action to enforce the leave rights. Mann v. Haigh, 120 F.3d 34, 37 (4th Cir. 1997). In the Mann decision, since the plaintiff was not a federal employee covered by the Civil Service Reform Act of 1978, and he was not entitled to a judicial review under the Administrative Procedure Act, his right to appeal his termination was limited to procedural safeguards provided by the nonappropriated fund activity. Id. at 38.

Civil Service Retirement Act—The Civil Service Retirement Act, 5 U.S.C. §§ 8331 - 8351, entitles certain government employees to deferred retirement annuities. Typically, in order to be eligible for a retirement annuity under the Civil Service Retirement Act, an individual must complete at least five years of "creditable" civilian service and must complete at least one year of "covered" civilian service in the final two years of employment. 5 U.S.C. §§ 8333(a), (b); Dupo v. OPM, 69 F.3d 1125, 1128 (Fed. Cir. 1995). Although most service in the federal government is creditable, service with a nonappropriated fund activity is not, as a general rule, creditable service for purposes of the Civil Service Retirement Act. Nonappropriated fund activity employees are excluded from the definition of an "employee" for purposes of laws administered by the Office of Personnel Management which includes the Civil Service

Retirement Act. 5 U.S.C. § 2105(c). See also, Dupo, 69 F.3d at 1128. However, Congress has provided that in limited circumstances, service with a nonappropriated fund activity may be creditable for purposes of the Civil Service Retirement Act. The Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986, Pub. L. No. 99-638, 100 Stat. 3535 (1986), codified at 5 U.S.C. § 8332(b)(16), provides that the following service is creditable:

> "service performed by any individual as an employee described in section 2105(c) of this title after June 18, 1952, and before January 1, 1966, if (A) such service involved conducting an arts and crafts, drama, music, library, service club, youth activities, sports or recreation program (including any outdoor recreation program) for personnel of the armed forces, and (B) such individual is an employee subject to this subchapter on the day before the date of the enactment of the Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986."

Therefore, nonappropriated fund activity employees are entitled to civil service retirement credit for that service only if they meet the following criteria: (1) the service to be credited was performed for a nonappropriated fund activity between June 18, 1952, and January 1, 1966; (2) the service performed during that period involved conducting certain activities as listed in 5 U.S.C. § 8332(b)(16); and (3) the individual was an employee subject to the Civil Service Retirement Act on November 9, 1986. Dupo, supra at 1128. In the Dupo case, the Federal Circuit found that Mr. Dupo was employed by a nonappropriated fund activity for the time periods required for creditable service. However, he had not conducted the activities listed in section 8332(b)(16). The Dupo court held that for purposes of section 8332(b)(16), "conducting" means "to lead from a position of command" or "to direct the performance of" and employees who were administrative or support workers, such as Mr. Dupo, generally did not satisfy this requirement. Id. at 1129. Furthermore, Mr. Dupo had been separated from service prior to November 9, 1986 and did not meet the third requirement. Thus, he was not entitled to a civil service retirement annuity.

Relocation Expenses—Sections 5724 and 5724a of title 5, United States Code, authorize an agency to pay transferred employees travel and transportation expenses, various allowances, and relocation expenses. However, these expenses are allowable only for "an individual employed in or under an agency". 5 U.S.C. § 5721(2). Thus, an individual is entitled to these expenses if the agency from which he transfers and the agency to which he transfers are within this coverage. Nonappropriated fund activities are not considered federal agencies for the purpose of receipt and disbursement of funds, including payments to their employees. B-215398, October 30, 1984. Employees of a nonappropriated fund activity are not employed by an "agency" within the meaning of section 5721(1) and are not entitled to relocation expenses under section 5724 and 5724a when they transfer to a federal agency. Id. However, when they transfer to positions in the DOD or Coast Guard, employees of DOD or Coast Guard NAFIs are authorized travel, transportation and relocation expenses under the same conditions and to the same extent authorized for transferred employees. 5 U.S.C. § 5736.

Dual Compensation Laws—The dual compensation laws were intended to preclude "double dipping" in other words, to protect the taxpayer from paying the same individual two salaries. One way this has been manifested is in a provision which dictated that the retired pay of a regular retired officer be reduced if he held a position with the United State Government or if his retired pay together with his civilian pay exceeded level V of the Executive Schedule. 5 U.S.C. §§ 5531, 5532.[256] In this, "position" is defined as:

> "a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia." 5 U.S.C. § 5531(2) (emphasis added).

Thus, for example the retired pay of retired regular officers of the armed forces who are employed with Department of Defense nonappropriated fund activities was subject to reduction in order to avert dual compensation.

There are nonappropriated fund activities outside the Department of Defense that employ retired officers of the armed forces and the

[256]Section 5532 was repealed, effective October 1, 1999. Pub. L. No. 106-65, Div. A, tit, VI, § 656 (a) (1), 113 Stat. 664 (October 5, 1999). We mention this provision nevertheless because the cases which apply it also apply other dual compensation provisions. Both those cases and the other dual compensation statutory provisions remain valid—in their own right, and in their usefulness in determining whether and when an entity is a NAFI or not.

courts have considered the applicability of the dual compensation laws to them. In Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), the Federal Circuit considered whether the phrase "including . . . a nonappropriated fund instrumentality under the jurisdiction of the armed forces" was intended to include other nonappropriated fund activities such as the Federal Reserve Board. The Federal Circuit concluded that although there did not appear to be a reason for Congress to limit the purpose of the dual compensation laws, Congress had limited the provision to retired military officers employed by nonappropriated fund activities of the armed forces and the court would not legislate in its stead. Id. at 1008. Thus, in the Denkler case, employment with the Federal Reserve Board, a nonappropriated fund instrumentality not under the jurisdiction of the armed forces, was not a position under the dual compensation principles.

GAO followed the Denkler decision in 67 Comp. Gen. 437 (1988) in a case involving three retired military officers who were employed by the Federal Reserve System (FRS). GAO deferred to the weight of judicial opinion holding that the FRS was a nonappropriated fund instrumentality not under the jurisdiction of the armed forces and therefore not subject to the dual compensation pay reduction. Id. at 440. In that decision, GAO also analyzed the laws governing the Office of Civilian Radioactive Waste Management, an organization within the Department of Energy, to determine whether this entity was a nonappropriated fund instrumentality. Because its funds came from user fees which were deposited in the Treasury for use in paying the Office's expenses, GAO concluded that it was not a NAFI. Id. at 441. Thus, the Denkler decision was not applicable and employees of the Office of Civilian Radioactive Waste Management were subject to the dual compensation provisions. See also B-236979, April 19, 1990 (since its funds are collected by the Commission and deposited into a revolving fund in the Treasury and withdrawn from the fund pursuant to appropriation acts, Panama Canal Commission is not a nonappropriated fund activity and its employees are subject to the dual compensation reductions).

Title VII of the Civil Rights Act and Age Discrimination In Employment Act—Nonappropriated fund employees are entitled to maintain actions under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-16(a). See B-234746-O.M., March 10, 1989. Nonappropriated fund employees are entitled to maintain actions under the Age

Discrimination Act. 29 U.S.C. § 633a. The proper defendant to be sued under these statutes is the head of the department, agency or unit, which (in the case of AAFES) is the Secretary of Defense or the Secretary of the Air Force and the Secretary of the Army jointly. Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988) (AAFES is not an executive department, agency, or unit; it is an instrumentality of the United States operating under the Department of Defense).

Employment for Purposes of Immigration Laws—Nonappropriated fund activity employees have been considered as employees of the United States for other purposes. For example, the Office of Legal Counsel of the Department of Justice considered whether nonappropriated fund activity employees were considered employees of the United States under the Immigration and Nationality Act. 1 U.S. Op. Off. Legal Counsel 258 (1977). Under the Immigration and Nationality Act, an employee of the United States, upon the completion of 15 years of service, is eligible for classification as a special immigrant entitled to special consideration with his application for admission to the United States. The Office of Legal Counsel concluded that the Act of June 19, 1952, which we discussed above, demonstrated that Congress assumed that in the absence of an express statutory exclusion, nonappropriated fund activity employees were regarded as employees of the United States. The Office of Legal Counsel stated that as a general rule, nonappropriated fund activity employees should be regarded as employees of the United States unless a Federal statute provides otherwise. In the case of the Immigration and Nationality Act, the Office of Legal Counsel concluded that neither the language or history of the Act suggested that employee of the United States was intended to have a restricted meaning. Further, since Congress' primary intention was to facilitate the immigration of persons serving the Government abroad and nonappropriated fund activity employees were not excluded, they were eligible for classification as special immigrants under the Act.

Criminal Statutes—Since nonappropriated fund employees are not federal employees for many purposes, several employees tried to use this as a defense when charged with bribery under a federal statute. Harlow v. United States, 301 F.2d 361 (5th Cir. 1962). Mr. Harlow and his co-conspirators were employed by the European Exchange System, a nonappropriated fund activity. They were responsible for contracting for the exchange. They established various Swiss bank accounts, solicited bribes from vendors seeking to do business with the exchange, and deposited the bribes into those accounts. In appealing their convictions for corruption, the defendants argued that, as nonappropriated fund employees, they were not federal employees and could not be charged under a federal statute making it a crime for any employee or person acting for or on behalf of the United States to solicit or receive bribes. Although the court agreed that they were not federal employees, it declined to dismiss those charges because the defendants could be included under the term "person acting for or on behalf of the United States." The court reasoned that nonappropriated fund activities are instrumentalities of the United States Government and the employees, acting on behalf of the exchange in making contracting decisions, were acting on behalf of the United States. Id. at 370-71.

Tort Claims—The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, waived most of the government's sovereign immunity from torts. While the FTCA does not specifically refer to nonappropriated fund instrumentalities, courts in certain instances have interpreted the FTCA's coverage to include certain NAFIs that the courts consider to be federal instrumentalities. See, e.g., Brucker v. United States, 338 F.2d 427 (9th Cir. 1964) (military flying club); United States v. Hainline, 315 F.2d 153, (10th Cir. 1963) (military flying club); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960) (Naval Officers' Mess). However, an equestrian club on an Army base was not covered under the FTCA. Scott v. United States, 226 F. Supp. 864 (M.D. Ga. 1963); aff'd, 337 F.2d 471 (5th Cir. 1964).

Injuries to military service members when they are involved in NAFI activities, such as social or flying clubs, are considered to be in connection with their military service and the Feres Doctrine bars recovery under the FTCA. Pringle v. United States, 44 F. Supp.2d 1168 (D. Kan. 1999); Eckles v. United States, 471 F. Supp. 108 (M.D. Pa. 1979) and cases cited therein.

However, injuries to employees of NAFIs arising in the course of employment are covered under the Longshoremen's and Harbor

Workers' Compensation Act (33 U.S.C. Ch. 18, see 5 U.S.C. § 8173), and not the Federal Employees Compensation Act or the FTCA. Traywick v. Juhola, 922 F.2d 786 (11th Cir. 1991); Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988).

D. Trust Funds

On June 27, 1829, an English chemist and mineralogist, James Smithson, died in Genoa, Italy. In 1835, in Pisa, Italy, James Smithson's nephew died without heirs. Smithson's will had stipulated that, if his nephew died without heirs, his estate should go, in trust, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge."

The President expressed doubts about the legality of accepting the gift and sought statutory authority to do so. In Congress, the decision to accept Mr. Smithson's gift was not open and shut. Senator John C. Calhoun led a determined minority that opposed accepting the gift. Senator Calhoun argued that the gift abridged states' rights and was beneath the dignity of the government to accept. Federalism and dignity aside, money was then, and still is, a useful commodity. Accordingly, by Act of July 1, 1836, ch. 252, 5 Stat. 64, Congress authorized the acceptance of the Smithson bequest. Shortly thereafter, President Andrew Jackson appointed Mr. Richard Rush to pursue the claim of the United States in the Court of Chancery of England. Two years later, the Chancery Court awarded Smithson's estate to the United States.

Mr. Rush sold Mr. Smithson's properties, converting the proceeds into gold sovereigns. On July 17, 1838, he sailed for home, taking with him 11 boxes containing 104,960 sovereigns, 8 shillings, and 7 pence, as well as Mr. Smithson's mineral collection, library, scientific notes, and personal effects. Arriving in New York after a six-week voyage, Mr. Rush transferred the gold coins to the Treasury to be melted down.

Eight years passed before the Congress resolved what should be done with Smithson's bequest. Suggestions included a national university, a public library, common schools, and an astronomical observatory. Congress settled the matter by Act of August 10, 1846, ch. 178, 9 Stat. 102, creating the Smithsonian Institution and leaving it up to the new Institution's Board of Regents to decide on the specific activities to undertake for the faithful execution of the Smithson trust. Congress directed that the principal of the Smithson bequest, "being the sum of $541,379.63," be lent to the United States Treasury and invested in public debt securities. 20 U.S.C. § 54. Congress provided an appropriation of the interest from the securities for the perpetual maintenance and support of the Smithsonian Institution. Id.

The legislative history surrounding acceptance of the Smithson Bequest and the founding of the Smithsonian Institution suggests that this may well have been one of the earliest instances of the United States accepting the role and responsibilities of "trustee" for private funds.[257] Today, the United States has many different "trust funds."

As a general proposition, the United States holds funds or property "in trust" in three different situations. Like the Smithson bequest, the federal government may hold funds in trust that are donated to (and accepted by) the United States. Second, the United States may have a trust obligation with respect to property of others that it controls and manages. Third, the United States holds dedicated receipts appropriated to statutorily designated trust funds.

These days, it is clear that the federal government may hold funds "in trust" for any number of reasons and for any number of groups. Equally clear is that further generalizations are fraught with danger. In particular, care needs to be exercised with respect to the scope of the government's legal obligations to trust beneficiaries.

Usually, the creation, terms, and conditions of a trust depend solely upon the statute creating or authorizing the trust. However, from a fiscal law perspective, there can be other factors in the equation. The source of the funds held in trust is one of those factors. As the discussion below shows, sometimes the source of the funds determines whether the United States has a trust obligation with

[257] See Smithsonian Legacy, National Intelligencer, May 2, 1836 (congressional debates focused on whether sovereign governments can accept funds in trust), reproduced in "From Smithson to Smithsonian," http://www.sil.si.edu/Exhibitions/Smithson-to-Smithsonian/labels/027_high.html

respect to the funds it holds. It can also be significant where statutory restrictions on the use of appropriated funds are at issue.

Another factor is the "common law." The decisions of the accounting officers of the government, as well as those of the courts, frequently refer to or use common law trust concepts to analyze or resolve issues concerning property of others that the government holds or possesses. In this way, common law trust concepts inform the decision makers' judgment as they give meaning to the governing statutes. However, sometimes, it is the common law alone which creates and controls the government's obligations with respect to property it holds "in trust." Cf., e.g., United States v. Mitchell, 463 U.S. 206, 225 (1983) (discussed below). As the court observed in Cobell v. Norton, 240 F.3d 1081, 2001 WL 173299, at *19 (D.C. Cir. 2001), "[t]he general "contours" of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law."

One further word of caution: As suggested earlier, there is no one model of a federal trust fund. In certain situations the federal government may act and may have the legal obligation to act as a fiduciary with respect to funds or property it holds for the benefit of specified groups or individuals. In dollar terms, the amounts held in these "true" trusts are relatively small. There are, however, a relatively small number of statutorily designated "trust fund" accounts. While these accounts are designated trust funds for bookkeeping and accounting purposes, they are not trusts in the sense that Congress may not redefine eligibility of beneficiaries, alter benefit amounts or redirect receipts to other programs or purposes. Cf. OMB Circ. No. A-11, § 20.11(c) (1999) (2d paragraph). It is these statutorily designated trust accounts that contain the overwhelming amount of federal trust fund dollars. The use of the term "trust" in connection with these funds, however, implies greater rights in the "beneficiaries" and obligations in the "trustee," vis-à-vis the trust corpus, than the law actually recognizes.

1. Federal Funds and Trust Funds

The federal government holds funds in over 1,000 accounts. Budget Account Structure: A Descriptive Overview, GAO/AIMD-95-179 (September 1995). At the highest level of generality, these accounts are divided into two[258] major groups: federal funds and trust funds. OMB Circ. No. A-34, Instructions on Budget Execution, § 11.13(c)(2) (October 1999). Within each of these two groups there are several types of accounts.

a. Federal Funds

Federal funds include general fund expenditure and receipt accounts, special fund expenditure and receipt accounts, and intragovernmental, management, and public enterprise revolving fund accounts. Id. Of these accounts only the general fund receipt accounts are used to account for collections that are not earmarked by law for a specific purpose. Budget Issues: Earmarking in the Federal Government, GAO/AIMD-95-216FS (August 1995).

Public enterprise revolving funds and special funds also are financed by earmarked receipts. Public enterprise revolving funds are credited with receipts generated by a cycle of business-type operations with the public. A Glossary of Terms Used in the Federal Budget Process: Exposure Draft, GAO/AFMD-2.1.1, at 5 (Rev. January 1993). The Postal Fund is an example of such a fund. 39 U.S.C. § 2003. Its receipts come primarily from mail and service revenues and are available for authorized activities and functions of the Postal Service without further appropriation action. 39 U.S.C. § 2003(a).

Special fund accounts are established to record receipts collected from a specific source and earmarked by law for a specific purpose or program. OMB Circ. No. A-11, §§ 20.3, 20.11 (1999). As a general proposition, special funds operate like statutorily designated trust fund accounts with little substantive difference other than that the authorizing legislation does not designate them as trust funds.[259] Budget Issues: Earmarking in the Federal Government, GAO/AIMD-95-216FS (August 1995). The Nuclear Waste Fund, 42 U.S.C. § 10222(c), is an example. It receives mainly two kinds of receipts: fees collected from civilian nuclear power operators and interest

[258]Compare 1 T.F.M. 2-1520, November 16, 1999, which breaks down the accounts into three classifications: general funds, trust funds and special funds.

[259]The fact that other general authority would provide for the moneys in the fund to be accounted for and disbursed as trust funds does not affect their classification where Congress has specifically provided for deposit of the funds in a special deposit account. 16 Comp. Gen. 940 (1937).

income from investments in United States securities. 42 U.S.C. § 10222(a),(e). The amounts in this fund are only available for radioactive waste disposal activities including the development, construction, and operation of authorized facilities for the disposal of high-level nuclear waste. 42 U.S.C. § 10222(d).

b. Trust Funds

The trust fund group is comprised of trust fund expenditure accounts, trust fund receipt accounts, and trust revolving fund accounts.[260] OMB Circ. No. A-34, § 11.13(c)(2) (October 1999). The distinguishing characteristic of these accounts is that they represent accounts, designated by law as trust funds, for receipts earmarked for specific purposes and sometimes, but not always, for the expenditure of these receipts. Id. Trust fund expenditure and receipt accounts are nonrevolving.[261] Trust fund expenditure accounts record appropriated amounts of trust fund receipts used to finance specific purposes or programs under a trust agreement or statute. Trust fund receipt accounts capture collections generated by the terms of the trust agreement or statute. I T.F.M. 2-1520 (November 16, 1999). See also GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title II, § 2.2. These include non-revolving accounts finance programs such as the Social Security and Medicare programs.[262]

The other type of trust account, trust revolving fund accounts, cover the permanent appropriation and expenditure of collections used to carry out a cycle of business-type operations in accordance with a statute that designates the fund as a trust fund. One example is the Commissary Funds, Federal Prisons, 31 U.S.C. § 1321(a)(22), which uses profits earned on sales of goods and articles not regularly

[260]See Federal Trust and other Earmarked Funds, GAO-01-199SP (January 2001), for a discussion of the composition of trusts and other earmarked funds, including their treatment in the federal budget process.

[261]In other words, money deposited in, or spent from, these accounts generally may not be removed or replenished, respectively, without further legal authority. (See the general discussion of revolving funds in chapter 6, supra, at 6-130.)

[262]The Social Security and Medicare programs are funded out of two trust funds each—the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Trust Fund, and the Federal Supplementary Medical Insurance Trust Fund and the Federal Hospital Insurance Trust Fund, respectively. 42 U.S.C. §§ 405, 1395ii.

provided to inmates by the federal prisons for recreational and general welfare items. This category also includes a number of small trusts created to account for the expenditure of funds in accordance with a trust agreement where the government may act as a fiduciary. See 31 U.S.C. §§ 1321(b), 1323(c).

Data reported by the Congressional Research Service (CRS) indicated that there were 110 federal trust funds in fiscal year 1997. CRS, Federal Trust Funds: How Many, How Big, and What Are They For (updated June 30, 1998) (hereafter Federal Trust Funds). The number is small because a number of related funds were grouped together for reporting purposes. See also Trust Funds and Their Relationship to the Federal Budget, GAO/AFMD-88-55 (September 1988). Whatever the absolute number of trust funds held by the government, for fiscal year 1997, CRS reported that the 110 trust funds accounted for 38 percent of the federal government's receipts. Federal Trust Funds, supra. Of these, 15 accounted for 99 percent of the aggregate balances of all trust funds. This should not come as a surprise, considering that the Social Security Trust Funds and the Civil Service Retirement and Disability Trust Fund accounted for 69 percent of the aggregate trust fund balances and held 20 percent of the aggregate debt of the government. Id.

c. Congressional Prerogatives

Generally accepted governmental definitions do not constrain Congress in its designation of an account as a trust fund or special fund account.[263] Congress may and does approach the matter on a case-by-case basis. As a result, it is possible to find trust funds that share features of special funds and vice versa. For example, Congress designated the Environmental Protection Agency's Hazardous Substance Superfund as a trust fund, 26 U.S.C. § 9507, while it established the Department of Energy's similar Nuclear Waste Fund as a special fund on the books of the Treasury. Budget Issues: Trust Funds and Their Relationship to the Federal Budget, GAO/AFMD-88-55 (September 1988).

[263]"When I use a word . . . it means just what I choose it to mean—neither more nor less." Spoken by Humpty Dumpty in Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass 213 (Holt Rinehart, and Winston, 1961) (1871).

2. The Government as Trustee—Creation of a Trust

In governmental parlance, the term "trust funds" covers a lot of territory. Of course, it is applied in the classical sense to nongovernmental funds entrusted to the government. But it is also applied to certain governmental funds held by the government that have been designated as "trust funds" by statute. In addition, it is applied to funds that are donated to the government for specified purposes. Each of these uses of the term are discussed below.

a. Property of Others Controlled by the United States

At common law, a trust is "a fiduciary relationship with respect to property." Under it, the person holding title to the property has "equitable duties" to manage the property for the benefit of another person. This fiduciary relationship arises as a result of an expressed intention to create it. Restatement (Second) of Trusts, § 2 (1959). Clearly, the United States can act as a trustee. E.g., 1995 O.L.C. LEXIS 18 (May 22, 1995) ("[A]s sovereign, the United States has the capacity to act as a common law trustee.") (citing 2 Scott's Law of Trust and Trustees § 95 (4th ed. 1987)). Equally clear is that the terms on which the United States agrees to act as trustee vary widely. Thus, the initial questions are when does a "trust" arise and what are the conditions under which the government, as trustee, operates. The discussion that follows examines these issues.

Two Supreme Court decisions involving claimed breaches by the United States of trust obligations owed to Quinault Reservation Indian allottees address when an actionable trust may arise. In United States v. Mitchell, 445 U.S. 535 (1980), reh'g denied, 446 U.S. 992 (Mitchell I), Indian allottees sued the United States for damages for mismanagement of forest resources. The Indian allottees argued that the General Allotment Act imposed on the United States a fiduciary obligation to manage the forest resources for their benefit. The Indian allottees claimed that the breach of the fiduciary obligation created by the General Allotment Act entitled them to money damages for a breach of trust. The General Allotment Act required the United States to "hold the land . . . in trust for the sole use and benefit" of the allottees. Mitchell I at 541 (quoting the General Allotment Act, codified as amended, at 25 U.S.C. § 348). The Supreme Court rejected the Indian allottee's argument, reasoning that Congress used the trust language of the General Allotment Act for the limited purpose of preventing alienation of allotted lands and immunizing the lands from state taxation. The Act created only a "limited trust relationship" for those purposes, and did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." Id. at 542. Absent such responsibilities, the United States was not answerable for damages. Id. "[A]ny right of the [allottees] to recover money damages for Government mismanagement of timber resources must be found in some source other than the [General Allotment Act]." Id. at 546.

Fortunately for the Indian allottees, another source of authority was available to support their claim, and Mitchell I was not the last word on the matter. In United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II), the Supreme Court found that a trust duty did arise under several other statutes and regulations which, unlike the General Allotment Act, did expressly authorize or direct the Secretary of Interior to manage forests on Indian lands. Id. at 224. The Court explained that:

> "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian Allottees), and a trust corpus (Indian timber, lands, and funds)." Id. at 225.

Quoting from the Court of Claims decision in Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980), the Court emphasized that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists." Mitchell II, at 225. This remains true even if "nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." Id. Of course, where Congress has provided otherwise with respect to such moneys or property, those directions will control. Id. In other words, to recover for a breach of trust, the beneficiaries must be able to establish a trust responsibility that mandates monetary relief by statute, treaty, or the government's assumption of management and control over the funds or assets.

Consistent with Mitchell II, one court recently observed, "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable." Cobell v. Norton, 240 F.3d 1081, 2001 WL 173299 at *1 (D.C. Cir. 2001). In recent years, Indian claimants have sought to compel the government to properly account for the funds it holds for them. For its part, the government has had to acknowledge that it doesn't know how many accounts it is responsible for, is uncertain of the balances in them, and lacks the records necessary to determine that information. See, e.g., Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements, GAO/T-AIMD-94-99 (1994); Financial Management: BIA's Management of the Indian Trust Funds, GAO/T-AIMD-93-4 (1993).

The claimants in Cobell v. Norton brought a class action for injunctive relief and damages. (The district court bifurcated the proceedings and placed the reconciliation of the accounts and the claims for damages on hold pending completion of the court's investigation into the claims of inadequate accounting.) Finding that the government had breached its fiduciary duties, the trial court remanded the matter to the government with orders to promptly discharge its fiduciary duties in accord with the court's delineation of them. The court also retained jurisdiction over the matter and directed the government to file quarterly reports. Cobell, 2001 WL 173299, at *1-*4. The government appealed. Citing Mitchell II, the Circuit Court of Appeals for the District of Columbia agreed that the government owes common law fiduciary obligations to the Indians. The court noted that those obligations have been reaffirmed in a number of statutory provisions which specify how those duties are to be carried out. Id. at *17-*19. Those obligations include, the circuit court held, a "duty to account" which can be compelled by the courts, if unreasonably delayed or withheld. Id. at *20-*23. The circuit court agreed it had been, and affirmed and remanded the matter to the district court. Id. at *29.

In Fors v. United States, 14 Cl. Ct. 709 (1988), the Claims Court rejected claimant's argument that the Marine Corps had a fiduciary duty to invest[264] the accumulated back pay of a deceased Marine Corps pilot either as a result of the Missing Persons Act or the common law. The court pointed out that essential to the holding in Mitchell II was the Supreme Court's finding that the statutes and regulations at issue established fiduciary obligations of the United

[264]For more on a trustee's "duty to invest," see chapter 17(d)(4), below.

States in the management of Indian resources.[265] For the period at issue in Fors v. United States, there was no statutory or regulatory basis to charge the government with the fiduciary duties of a common law trustee. Id. at 718-19. To the contrary, the applicable statutes and regulations limited the Marine Corps authority to pay interest to 90 days after a determination of death. Id.

The Department of Veterans Affairs "personal funds of patients" trust fund, discussed earlier in chapter 9, contains moneys of patients who, as a matter of convenience, deposit money with VA for safekeeping and use during their stay at VA hospitals. See 38 U.S.C. § 5504. The money is patient money, not government money, and the Comptroller General has treated such funds as held in trust by the United States. 68 Comp. Gen. 600 (1989).

The Attorney General has applied a Mitchell II analysis with respect to moneys contained in inmates' Prisoners' Trust Accounts. Op. Off. Legal Counsel, Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 1995 O.L.C. LEXIS 18 (May 22, 1995). In the 1930s, the Department of Justice established Prisoners' Trust Funds at each federal prison for inmates to deposit money earned or sent to them while in prison. Inmates could use amounts in their accounts to purchase articles from prison commissaries. In the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1224, Congress classified the Prisoners' Trust Fund (and the related Commissary Fund discussed below) as a "trust fund" and provided a permanent appropriation to disburse money from the fund in compliance with the terms of the trust. See 31 U.S.C. §§ 1321(a)(21), 1321(b).

The Office of Legal Counsel (OLC) found the reasons to conclude that 31 U.S.C. § 1321 and the rules set forth in the Justice Department circular establishing the funds impose fiduciary obligations on the Bureau of Prisons with respect to amounts held in

[265]See also Hohri v. United States, 782 F.2d 227, 243 (D.C. Cir. 1986) (neither narrow regulatory obligations or alleged contractual commitments impose fiduciary obligations on United States with respect to Japanese-American internees during World War II), vacated and remanded on jurisdictional grounds, United States v. Hohri, 482 U.S. 64 (1987); Han v. United States, 45 F.3d 333 (9th Cir. 1995) (United States has no general fiduciary obligation to bring suit against the State of Hawaii for alleged breach of trust obligations owed by the state to native Hawaiians).

The Prisoners Trust Funds. First, the money in the Prisoners' Trust Fund account is the inmate's property even though the Bureau of Prisons has assumed control over the property. Second, the circular establishing the funds requires the Bureau of the Prisons to act in the best interest of the prisoners in managing their funds, and third, the Bureau has always viewed their relationship to the Prisoners' Trust Funds as a fiduciary one.[266]

The Thrift Savings Fund established by the Federal Employees' Retirement System Act of 1986, 5 U.S.C. §§ 8401-8479, is also a trust in the classic sense of the term. The act provides federal employees a capital accumulation plan similar to those found in the private sector. Employees and the employing agencies contribute to the Thrift Savings Fund. Earnings on investments augment amounts contributed to the fund. 5 U.S.C. §§ 8432(a), (c), and 8437(b). All sums contributed to the Thrift Savings Fund by or on behalf of an employee as well as earnings on those contributions are held in trust for the employee. 5 U.S.C. § 8437(g). The Thrift Savings Fund is managed in accordance with the investment policies established by the Federal Retirement Thrift Investment Board. 5 U.S.C. § 8472. The members of the Board are specifically designated fiduciaries. 5 U.S.C. §§ 8477(a), (b). Any fiduciary who breaches the responsibilities, duties and obligations set out in the authorizing statute is personally liable to the Thrift Savings Fund for any losses

[266]There can be no doubt that the government has fiduciary obligations with respect to the Prisoners Trust Fund and VA Patient Funds mention above. Yet, we wonder: Do those funds really constitute "trust" or "bailments"? Cf. B-153479, April 15, 1964 (re: Prisoners Trust Fund). As OLC observed, fiduciary relations can arise in many different contexts. This is important because, as OLC also observed, quoting Restatement (Second) of Trusts § 2, comment b, at 7 (1959), "[t]he duties of a trustee are more intensive than the duties of some other fiduciaries." For one thing, no one has held—so far—that the government has a duty to invest those funds and make them productive. See chapter 17(D)(4), supra. Cf. note 6 and related text, supra.

and profits realized as a result of a breach of trust. 5 U.S.C. § 8477(e).[267]

Claimants have sought to use trust concepts to recoup funds in the Treasury. In Stitzel-Weller Distillery v. Wickard, 118 F.2d 19 (D.C. Cir. 1941), distillers sought to recover contributions paid into the Treasury pursuant to marketing agreements authorized by the Agricultural Adjustment Act. Previously, in United States v. Butler, 297 U.S. 1 (1936), the Supreme Court had declared related provisions of the act unconstitutional. Then, given the constitutional defects of the authorizing legislation, the Comptroller General concluded that the moneys could no longer be applied to the agreed upon purposes and had to be deposited into the general fund of the Treasury. 15 Comp. Gen. 681 (1936). In response, the distillers claimed that their contributions were impressed with a trust by virtue of section 20 of the Permanent Appropriation Repeal Act, 1934. That act recognized the existence of trust funds "analogous" to those specified in it and provided a permanent appropriation for payment of amounts held in such trust accounts. 31 U.S.C. § 1321(b). The claimants also argued that the contributions should be returned to them based on the general equitable doctrine that upon the failure of a trust, the trustee must return the trust corpus to the creator of the trust, in this case, the contributors. The court in Stitzel-Weller rejected the notion that the marketing agreement either explicitly or by analogy to other funds classified as trusts by the Permanent Appropriation Repeal Act, 1934, created a trust for the benefit of the contributors. Since there was no trust, there was no appropriation nor other authority to return the funds from the Treasury to the contributing distilleries. 118 F.2d at 21 (citing 15 Comp. Gen. 681).

Similarly, in United States v. $57,480.05 United States Currency and Other Coins, 722 F.2d 1457 (9th Cir. 1984), a claimant sought recovery of $57,480.05 forfeited and paid into the Treasury. In

[267]Given the nature of these accounts, GAO recommended removal of the fund from the federal budget. B-227344, May 29, 1987. And, it was done! See Budget of the United States Government, Fiscal Year 2001: Analytical Perspectives, at 377. Beginning in fiscal year 2000, the federal budget also excludes funds owned by Indian tribes, but held in trust by the government. As the notes to the federal budget explains, "the transactions of these funds are not transactions of the Government itself." Id. The Budget notes refer to these (and the Thrift Savings Fund moneys) as "deposit Funds." Id.

dismissing the case for lack of jurisdiction over the res, the court pointed out that a judgment for the claimant "would require an impermissible payment of public funds not appropriated by Congress." Id. at 1459. The court rejected the claimant's suggested solution of "[e]nforcing a constructive trust on the Government," noting that such a trust "would violate sovereign immunity in the absence of statutes or regulations clearly establishing fiduciary obligations." Id.

The two proceeding cases involved unsuccessful attempts to recover funds in the Treasury by impressing them with an implicit common law trust. However, other cases have held the government liable for funds received in trust for others. For example, as discussed in chapters 6(E)(2)(h) and 9(B)(3)(d) above, the Government receives moneys to reimburse injured or overcharged consumers or residents that the government holds in trust to disburse to the injured parties. Emery, et al. v. United States, 186 F.2d 900 (9th Cir. 1951); 60 Comp. Gen. 15 (1980). Since these moneys are not received for the use of the United States, they are not for deposit in the Treasury of the United States, nor is an appropriation needed for the Treasurer to disburse such funds. Cf. Varney v. United States, 147 F.2d 238 (6th Cir. 1945), cert. denied, 325 U.S. 882 (1945), reh'g denied, 326 U.S. 805 (1945) (moneys received by War Food Administrator were "trust funds" retained and disbursed by market agents appointed by Administrator without deposit into the Treasury of the United States).

Simply because a government official has custody of non-government funds does not mean that they are held in a trust capacity. In B-164419-O.M., May 20, 1969, GAO distinguished between funds of a foreign government held by the United States incident to a co-operative agreement (trust funds), and funds of a private contractor held by a government official for safekeeping as a favor to the contractor. The latter situation was a mere bailment for the benefit of the contractor. Although the United States may have an obligation to exercise ordinary care with respect to bailed funds in its custody,[268] 55 Comp. Gen. 356 (1975); 23 Comp. Gen. 907 (1944), the government official with custody of the funds is not an accountable officer with respect to those funds. See also White House: Travel Office Operations GAO/GGD-94-132, App. I: 1.5 (May 1994) (government would be "morally or legally" liable for loss of funds collected by White House staff from press corps members to pay for press corps members' travel expenses as they accompany the President on trips; therefore, those funds shall be deposited in a Treasury account for safekeeping).

b. Trust Funds Designated by Statute

Earmarking alone does not create a trust fund since earmarked receipts can finance other types of accounts such as special funds. For example, Congress created the Vaccine Injury Compensation Trust Fund to compensate victims of vaccine-related injury or death. 26 U.S.C. § 9510. The Fund is financed by a tax on certain vaccines. Id. On the other hand, the North Pacific Fishery Observer Fund covers the cost of observers stationed on fishing vessels to collect information for fish management and conservation. Congress finances the program by assessing fees on fishing vessels and fish processors. 16 U.S.C. § 1862(d). Since Congress did not by statute designate the Observer Fund as a "trust fund," Treasury classified it as a special fund.

The fact that money is held in a "trust account" does not necessarily create fiduciary obligations where they do not otherwise exist. See B-274855, January 23, 1997. Most federal trust funds are trust funds simply because Congress says so, or, euphemistically, because the

[268] A bailment is a "species" of trust. 8 C.J.S. Bailments 2 (1988). A bailment arises when the owner delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the property when the purpose of the bailment has been fulfilled. 53 Comp. Gen. 607, 609 (1974). Unlike a trust where title to the trust corpus passes to the trustee, in a bailment, title to the bailed property does not transfer. 8 C.J.S. Bailments § 13 (1988). The level of care required of a bailee depends on whether the bailment is for the benefit of the bailee, the bailor, or for their mutual benefit. 8 C.J.S. Bailments § 48 (1988). As "one who holds a thing in trust for another," 36A C.J.S. Fiduciary (1961), a bailee qualifies generally as a "fiduciary." Though not treated as fiduciaries for all purposes, bailees have long been included within "the more general class of fiduciaries." E.g., In re Holman, 42 B.R. 848, 851 (1984). See also United States v. Kehoe, 365 F. Supp. 920, 922 (S.D. Tex. 1973) ("It was this failure of the common law to provide any remedy for these breaches of trust . . . on the part of . . . bailees, trustees, and other persons occupying fiduciary positions that led to the enactment of the present Penal Code provision dealing with embezzlement."), quoting 21 Tex. Jur.2d Embezzlement and Conversion § 2 at 579-80 (1961) (emphasis added).

law designates them as such. Typically, the enabling legislation will earmark receipts or other money generated by a program for deposit in a fund designated by the program legislation as a "trust fund." See the Trust Fund Code of 1981, 26 U.S.C. Subtitle I, for a listing of trust funds. These trust funds serve as accounting devices to distinguish the funds earmarked for deposit to the trust funds from general funds. The scope of the trustee's duties with respect to a trust fund will necessarily depend on the substantive law creating those duties. See, e.g., United States v. Mitchell, 463 U.S. 206, 224 (1983) (statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.")

The fact that Congress has designated a fund which finances a social service, public works, or revenue sharing program as a "trust fund" does not mean that the administering agency has a full range of fiduciary obligations. A leading case on this matter (not involving Indian lands or property) is National Ass'n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988), rev'g National Ass'n of Counties v. Baker, 669 F. Supp. 518 (D.D.C. 1987), cert. denied National Ass'n of Counties v. Brady, 488 U.S. 1005 (1989). In that case a number of local governments sued the Secretary of the Treasury seeking an order requiring the Treasury to release $180 million of Revenue Sharing Trust Fund moneys sequestered pursuant to the Gramm–Rudman–Hollings Act, Pub. L. No. 99-177, 99 Stat. 1038 (1985). The district court issued an order requiring the Secretary to disburse the funds, and the Secretary appealed.

The Secretary argued that the district court lacked subject matter jurisdiction because the local governments were in effect asserting a money damage claim that only may be brought in the Claims Court. 842 F.2d at 372. To sustain this argument the Secretary had to establish that substantive law mandated compensation for damages. The Secretary argued that because the Revenue Sharing Act created a trust fund with the Secretary as trustee, the statute was similar to the statutes found by the Supreme Court in Mitchell II to create a fiduciary duty in the United States, the breach of which mandated compensation.

The court of appeals rejected the Secretary's reliance on Mitchell II. The court concluded instead that the Revenue Sharing Act created only a limited trust relationship similar to the General Allotment Act trust in Mitchell I. Id. at 375. Congress created the Revenue Sharing

Trust Fund for budgetary reasons, not to subject the Secretary to actions for mismanagement of the trust. Id. at 376. "Indeed, there is no indication in the Revenue Sharing Act or its legislative history that the Secretary owes any common law fiduciary obligations to Trust Fund recipients." Id. The Court rejected an implied right of action in favor of trust recipients based on a generalized common law trust theory because the substantive statute at issue did not make the United States expressly liable for mismanagement of the trust.

Applying the analysis used in Mitchell I and II and in National Ass'n of Counties v. Baker, the Office of Legal Counsel (OLC) has construed the Bureau of Prison's obligations for the Commissary trust fund, classified as a trust fund under 31 U.S.C. § 1321, to not include common law fiduciary duties. Op. Off. Legal Counsel, Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, May 22, 1995. OLC discerned no indication in the legislative history of the Permanent Appropriation Repeal Act, 1934, the source statute for 31 U.S.C. § 1321, that Congress intended to subject the United States to suit for breach of fiduciary obligations in the management of the Commissary fund. Unlike the Prisoners' Trust Fund accounts discussed earlier in this part, the moneys in the Commissary fund were not the personal funds of the inmates, but resulted from a continuous cycle of business operations. The Bureau of Prisons retained the authority to decide whether and how much of any profits were to be disbursed through the welfare fund for the benefit of the inmate population. See Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994) (district court did not abuse discretion in preliminarily enjoining Bureau of Prisons from alleged misappropriation of Commissary funds for purchase of telephone system to support prison security).

c. Donated Funds

As noted earlier in this publication, a number of departments and agencies have specific statutory authority to accept gifts. (See section E, 3(a) in chapter 6). The level of detail addressed by these statutory authorities varies. Compare, e.g., 22 U.S.C. § 2697 (acceptance of unconditional and conditional gifts by the Secretary of State) with 31 U.S.C. § 3113 (acceptance of gifts to reduce the public debt). Section 19 of the Permanent Appropriation Repeal Act, 1934, 31 U.S.C. § 1323(c), provides general guidance concerning accounting for gifts and donations. Pursuant to this statute, donations or gifts are treated as trust funds and must be deposited in the Treasury as such. Like the statutory trust funds catalogued at 31 U.S.C. § 1321(a) and the analogous trust funds established pursuant to 31 U.S.C. § 1321(b), Congress has provided a permanent appropriation for donated funds. 31 U.S.C. § 1323(c) ("Donations . . . shall be deposited in the Treasury as trust funds and are appropriated for disbursement under the terms of the trusts").

Before a government officer may accept a donation that would require the management of a trust, the officer must have the authority to bind the government to act as a trustee, with the attendant responsibilities and cost.[269] This was the issue in 11 Comp. Gen. 355 (1932). The Secretary of the Navy asked whether he was authorized to accept a bequest to the United States Naval Hospital in Brooklyn, New York, to be invested in a memorial fund. The proceeds of the trust were to be used for the maintenance and comfort of sailors in that hospital. The Comptroller General concluded that the President's gift acceptance authority was limited to hospitals for merchant seamen, not naval hospitals. Observing that if the testamentary gift was accepted, the United States would "become, in effect, a trustee for charitable uses," the Comptroller General ruled "that such an obligation could not legally be assumed by an officer of the United States without express statutory authority therefor." Id. at 356. To drive home the point, the Comptroller General further noted that without such authority, there would be no basis to use any appropriations to cover the necessary expenses of administering such a trust fund. Id.

A similar issue was touched on in 27 Comp. Gen. 641 (1948). In that decision, the issue was whether the Department of State creation of a trust fund for the education of Persian students in the United States as part of a settlement of claims of the United States against the Persian government. The answer to that question seems to have been that the President acting through the State Department had the authority to agree to the creation of trust. However, the decision ultimately turned not on the scope of the President's authority, but on "precisely what the terms of the agreement were." Id. at 645. The Comptroller General concluded that the agreement reached did not

[269] Cf. 4 First Comp. Dec. 457, 458 (1883) ("The Government cannot, without its authorized express consent, be forced to occupy the position of a trustee."), citing United States V. Morris, 23 U.S. (10 Wheat.) 246, 303 (1825).

include the use of the funds for the benefit of the Persian students. Accordingly, the Secretary could not later, without additional consideration, modify the agreement to create a trust obligation on the part of the United States. Id. at 646.

3. Application of Fiscal Laws

a. Permanent Appropriation Repeal Act, 1934

Prior to 1934, government officials held a number of trust fund accounts outside the Treasury. The Comptroller General had directed the deposit of the funds to the accounts of Treasury officials in order to ensure that a proper accounting and audit was made of all disbursements. The Comptroller General permitted the withdrawal of trust funds, after deposit in the Treasury, without an express appropriation from the Congress. The Congress objected to the Comptroller General's approval of withdrawals of trust fund moneys without an appropriation as a violation of the constitutional prohibition that "no moneys shall be drawn from the Treasury but in consequence of an appropriation made by law." H.R. Rep. No. 73-1414 at 12 (1934). Ironically the solution, was to provide a permanent appropriation for trust funds as part of legislation designed to repeal permanent appropriations in general. Id. Accordingly, in section 20 of the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1233 (codified at 31 U.S.C. § 1321(a)), Congress listed all funds of a trust nature that Congress wanted to maintain on the books of the government and provided a permanent appropriation for these funds. See also S. Rep. No. 73-1195, at 1-3 (1934); H.R. Rep. No. 73-2039, at 6 (1934) (conference report). See B-226801, May 4, 1988 for a comprehensive discussion of the Permanent Appropriation Repeal Act.

Section 20 of this act also provides prospective guidance. Any amounts received by the United States as trustee which are analogous to the funds listed in subsection (a) are for deposit in a trust account of the Treasury. Amounts "accruing to these funds" are permanently appropriated for expenditure in accordance with the terms of the trust. 31 U.S.C. § 1321(b). See also 31 U.S.C. § 1323(c).

b. Available Uses of Trust Funds

(1) Donated funds

Funds held in trust are available only for trust purposes. Where an agency is authorized to accept a donation of funds for specified purposes, the funds may only be used for purposes necessary to carry out the trust. 17 Comp. Gen. 732 (1938). For the accepting agency to do otherwise would be a clear breach of the terms of the agreement governing the gift. 47 Comp. Gen. 314 (1967). (Of course, an agency's authority to agree to any particular use of donated funds is limited by the terms of its statutory authority to accept donations. 11 Comp. Gen. 355 (1932).)

Appropriated funds are subject to many use restrictions. (See chapter 6 below.) Depending on the terms of the donation, some of those restrictions may not apply to donations accepted by authorized officers of the United States. In several cases GAO has held that:

> "where the Congress authorizes federal officers to accept private gifts or bequests for a specific purpose, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out the purposes of the trust . . . without reference to general regulatory and prohibitory statutes applicable to public funds." 16 Comp. Gen. 650, 655 (1937).

See also 36 Comp. Gen. 771 (1957); 46 Comp. Gen. 379 (1966) (although funds appropriated directly to the National Science Foundation were not available for conference expenses, donated funds were); B-131278, September 9, 1957; B-135255, March 21, 1958; B-170938, October 30, 1972. While all the restrictions on the use of appropriated funds may not apply, donated funds are available only for use in furtherance of authorized agency purposes consistent with the terms of the trust. B-195492, March 18, 1980.

In 23 Comp. Gen. 726 (1944), the Comptroller General was asked what the National Park Trust Fund Board could do with the principal of gifts received in trust for the benefit of the National Park Service where the donor had not prescribed a particular purpose for the gift. The Board's statutory authority, the Act of July 10, 1935, sec. 2, 49 Stat. 477, was silent on this point. The act did direct the Secretary of Treasury to invest donations for the account of the Board consistent with the laws applicable to a trust company in the District of Columbia and to credit the income from such investments to the National Park Trust Fund. Since the Board's statute did not authorize use of the principal of a gift, the Board could not invade the principal. However, to give “some effect to the action of the respective donors” in making a gift, the Board could use investment income for the presumed purpose of the gift—the general benefit of the National Park Service, its activities or its services.

Another decision, B-274855, January 23, 1997, discussed the range of permissible uses of donated funds available to the now defunct United States Advisory Commission on Intergovernmental Relations (ACIR). Congress created the ACIR to give continuing attention to intergovernmental problems. To finance its activities, Congress authorized ACIR to solicit and receive contributions from, among others, state governments. In 1995, Congress terminated ACIR effective September 30, 1996. Two months prior to termination, Congress directed the National Gambling Impact Study Commission to contract with ACIR for research and authorized ACIR to continue in existence solely to perform the contract.

The question was whether prior unconditional state contributions were available to cover ACIR’s salaries and expenses until the National Gambling Commission awarded ACIR a contract. The states contributed funds to support ACIR’s authorized activities. The Comptroller General viewed the funds as unrestricted gifts. As unrestricted gifts, they were available for ACIR activities authorized by Congress at the time of obligation and expenditure regardless of the activities contemplated by ACIR and the states at the time the gifts were made. The Comptroller General further concluded that after ACIR completed its authorized study, any unused contributions were for deposit in the Treasury as miscellaneous receipts. Cf. 15 Comp. Gen. 681 (1936) (moneys received that could no longer be applied to agreed upon purposes due to constitutional defects of authorizing legislation are for deposit as miscellaneous receipts.

Like direct appropriations, moneys donated in trust are available for expenses reasonably related to the purpose of the trust. That is the message of 23 Comp. Gen. 726 (1944) and B-274855, January 23, 1997. In 55 Comp. Gen. 1059 (1976), we held that the Forest Service could not transfer funds donated to establish and operate a research facility to a private foundation to invest and use for a purpose other than establishing and operating a research facility.

We also have considered whether a trust fund could be used for expenses that the Comptroller General has traditionally viewed as personal. In 47 Comp. Gen. 314 (1967), we concluded that the purchase of seasonal greeting cards remained unallowable regardless of the fact that the Interior Department would pay for the cards from a trust fund for donations to the National Park Service. Trust funds are no more available for personal expenditures than appropriated funds.

While the rule seems simple enough, complexity appears in its application. In B-195492, March 18, 1980, Senator Proxmire questioned Interior's use of amounts held in its Cooperating Association Fund, established by 16 U.S.C. § 6 (1994), for contest entry fees, receptions for VIP guests, gifts and refreshments. While we reiterated that trust funds are not available for personal expenses, we noted that the strictures on the use of trust funds do not mirror those applicable to the use of appropriated funds. With respect to the "'entertainment,' 'gifts,' and other so called 'personal' items," we pointed out that the restrictions on the use of general agency appropriations for these purposes derived not from the idea that these could never be "official" expenses but that "such purposes are so subject to abuse as to require specific Congressional authorization before general agency appropriations may be so used." Since those expenses are not prohibited, where agencies can justify the use of trust funds as incident to the terms of the trust for what would otherwise be viewed as an improper personal use of general agency appropriations, we would not object. On the other hand, we noted that the availability of donated funds for travel and subsistence expenses is subject to the same rules as govern the use of appropriated funds because of statutory language that precluded the use of "funds appropriated for any purpose" for travel expenses of the kind at issue there.

(2) Property of others

General use restrictions have less applicability to the property of others being held in trust. In B-33020, April 1, 1943, we did not object to use of Osage Indian Trust Funds to cover the cost of telegrams sent to members of Congress concerning pending legislation affecting the Tribe that would have been prohibited by legislation concerning the use of appropriated funds to influence Congress. We did not object to these expenditures since Congress had appropriated the funds to be used for the benefit of Tribe and authorized the tribe to organize for its common welfare and to negotiate with federal, state, and local governments.

A slightly different twist on these concepts occurred in 20 Comp. Gen. 581 (1941). In that decision, the Library of Congress Trust Board held, as trustee, legal title to some improved real estate that the Federal Works Administrator wanted to lease. Standing in the way of the transaction was the longstanding rule of the accounting officers of the government that, absent statutory authority, the payment of rent by one agency to another for premises under the control of another is unauthorized. Since the United States did not in its own right hold legal title to, or have the beneficial right to the use of, the property, there was no objection to the payment of rent to the Library of Congress Trust Board in its capacity as trustee.

Similarly, the authority of the Pension Benefit Guaranty Corporation (PBGC), when acting as a trustee for terminated pension plans, is not constrained by laws applicable to contracting by federal agencies or the expenditure of public funds. B-223146, October 7, 1986. One issue addressed by the decision was PBGC's authority to modify to a contingent fee arrangement the fee provision of an existing contract with outside litigation counsel. Since PBGC was authorized by law to serve as a trustee for terminated pension plans, possessing all the rights and duties to act as a private trustee similarly situated, we could find no legal or public policy considerations which precluded PBGC's modifications of its contracts with outside counsel. Also, since any recoveries resulting from the litigation accrued to the terminated pension plan, the use by PBGC (in its capacity as trustee) of a portion of the recoveries to pay its contingent fee obligation would not violate the deposit requirements of the miscellaneous receipts statute.

(3) Statutory trust funds

Like donated funds held in trust, where Congress designates a trust account to receive dedicated tax receipts, the corpus of the trust is only available for trust purposes. The rationale for this axiom differs from cases where the government holds donated-funds accepted in trust. As noted earlier, in the latter case, the limitation on the use of funds derives in the first instance from the agreement with the donor. While an agency's statutory authority to accept a gift is relevant in prescribing the range of uses to which an agency may agree, it is the donor's action in making a restricted gift, i.e., one for designated purposes, that controls the particular use.[270]

Where the corpus of the trust account consists of dedicated tax receipts, the rationale for the rule is a function of Congress' constitutional prerogative to allocate resources for the general welfare. In other words, the limitation on the use of the funds for other than trust purposes derives from the terms of the statute creating the trust account and the Purpose Statute, 31 U.S.C. § 1301(a), limiting the use of appropriated funds only to purposes for which appropriated. One consequence of this distinction concerning the source of the limitation on use manifests itself when Congress decides to modify the authorized uses of the trust funds. In the case of trust funds designed to serve as accounting mechanisms for dedicated tax receipts, Congress as the creator of the "trust" can change or modify the permissible uses of the trust funds. Cf. 36 Comp. Gen. 712 (1957). For examples of Congress changing the uses of a statutory trust fund filled with tax revenues, see the legislative history recounted in B-289779, February 12, 1999.

As the prior discussion suggests, when resolving issues involving the application of statutory restrictions to this type of trust fund the Comptroller General will treat them more like a direct appropriation. In B-191761, September 22, 1978, an agency of the Department of Agriculture wanted to dip into a user fee trust fund to provide a uniform allowance to its employees. Section 5901, title 5, United States Code, requires that before an agency may use appropriated funds for uniforms, it must have specific statutory authority to do so. We resolved the issue on the basis of authority in Agriculture's appropriation act, which provided that "funds available to the Department" may be used for employee uniforms. Arguably, if donated trust funds were involved, the Department would have had

[270]An argument has been made that funds held in trust and expended pursuant to the permanent appropriation of moneys "accruing to these trust funds" contained in the Permanent Appropriation Repeal Act, 1934, 31 U.S.C. § 1321(b), are appropriated funds subject to the laws governing the obligation and expenditure of any other appropriated funds. See Soboleski v. Commissioner, 88 T.C. 1024, 1034 (1987), aff'd, 842 F.2d 1292 (4th Cir. 1988). This argument may go too far given the language of 31 U.S.C. § 1323 providing that "[d]onations . . . shall be deposited in the Treasury as trust funds and are appropriated for disbursement under the terms of the trusts . . . ."

a greater ability to use the funds for trust purposes unfettered by general regulatory statutes applicable to appropriated funds.

The essential point is that, if viewed like any other appropriation, amounts in a trust fund account may only be used for the purposes for which they were appropriated. As suggested above, depending on the source of funds, this may translate to mean no more than the authorized purposes of the trust.

c. Intergovernmental Claims

Another consequence of the distinction is seen in decisions involving intergovernmental claims. As a general proposition, a federal agency or establishment that damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may not assert damage claims against one another. E.g., 60 Comp. Gen. 710, 714 (1981). (See earlier discussion in Chapter 12, Section D, Interagency Claims.)

Claims involving property or funds held by the government in a trust capacity are an exception to this rule. In 41 Comp. Gen. 235 (1961), GAO found that the Bureau of Indian Affairs (BIA) could present a claim against the Air Force for damage to the San Carlos Irrigation Project caused by the crash of a Civil Air Patrol plane. Although the San Carlos Irrigation Project was an instrumentality of the United States, the project benefited the Pima Indians and was funded from moneys held in trust by the government for the Pima. The question was whether the BIA claim against the Air Force for damage to the project would constitute a claim by one government agency against another. The decision held that it would not. As BIA was acting in a trust capacity on behalf of the Pima, if the general rule were applied, the expense of repairing the damage would be borne not by the government but by the Pima. Thus, the claim was not that of one agency against another.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, August 12, 1968. The corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyu people. Another case applying the trust reasoning is B-35478, July 24, 1943 (since timberland was held in trust for counties, Bonneville Power Administration should pay for timber destroyed).

The "trust exception" of cases like 41 Comp. Gen. 235 and B-159559 has its limits and does not apply where the trust fund is more in the nature of an accounting or bookkeeping device. An illustrative case is 65 Comp. Gen. 464 (1986). A Navy plane had crashed into and destroyed a Federal Aviation Administration instrument landing system. Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, the Comptroller General viewed this "trust fund" as little more than an earmarked appropriation, not involving the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

4. Concepts of Amount and Time

Concepts of amount and time which are so important to general appropriations law (see chapters 5 and 6 of this publication) also come into play with trust funds. With respect to "amount," this would include concerns that trust funds are being used to augment regular appropriations. In B-107662, April 23, 1952, GAO reviewed a Commerce Department procedure for charging trust funds with the cost of employees assigned full time to activities funded by regular appropriations, but assigned intermittently for short periods to activities financed by trust funds. GAO had no objection to the Commerce procedure, but cautioned that the proper records needed to be kept to ensure that trust funds did not augment general fund appropriations. See also B-138841, September 18, 1959 (payment of regular weather bureau employees from Department of Commerce trust fund for intermittent services performed on trust fund projects).

As with other types of accounts, errors can and do occur that affect the amount properly credited to trust fund balances. When they do, the obvious solution is to correct them. GAO generally recognizes that an act of Congress is not necessary to correct clerical or administrative errors when dealing with the non-trust fund accounts of the government. 41 Comp. Gen. 16, 19 (1961). Where the evidence of an error is unreliable or inconclusive, the Comptroller General has objected to administrative adjustment of account balances. B-236940, October 17, 1989. This is particularly true where (as in the immediately preceding decision) the adjustment would result in additional budget authority being available to an agency.

In B-275490, December 5, 1996, we concluded that Treasury could credit to the Highway Trust Fund $1.59 billion mistakenly not credited to that account. Each month, Treasury transferred from the general fund of the Treasury amounts appropriated to the Trust Fund based on Treasury estimates of the specified excise taxes for the month. The Treasury then adjusted the amounts originally credited to the fund to the extent the estimates differed from actual receipts. Due to a change in reporting format and a resulting transcription error, Treasury substantially understated the adjustments to the income credited to the trust fund. The Department of Transportation and Treasury discovered the error when the year end statement was prepared. GAO agreed with Treasury that, as trustee of the Fund, Treasury should adjust the fiscal year 1994 and 1995 Trust Fund income statements to credit the Fund with the excise taxes originally not included in the Highway Trust Fund income statements' just as if Treasury had credited such amounts upon receipt of the reports from the IRS. The Comptroller General made the following observation:

> "Apart from whatever responsibilities the Secretary may have to accurately state the accounts of the United States, the Secretary in his capacity as trustee of the [Highway Trust] Fund has the duty to accurately account for the amounts in the Fund consistent with the terms of the appropriation made thereto and the applicable administrative procedures adopted to effectuate his statutory responsibilities." Id.

See also 67 Comp. Gen. 342 (1988) (Bureau of Indian Affairs has duty to make prompt corrective payments to trust account beneficiary before collecting from an erroneous payee. To avoid overdraft of an Individual Trust Account, BIA could use funds from its Operation of Indian Programs appropriations to correct the erroneous payment from the Individual Trust Account;) 65 Comp. Gen. 533 (1986) (Funds returned to Individual Indian Money Account, which were earlier improperly recovered, should be repaid from appropriations currently available for the activity involved.); 41 Comp. Gen. 16 (1961) (Incorrect allocation of federal highway funds to states was an act in excess of statutory authority and consequently must be corrected through appropriate adjustments). In addition see earlier discussion of restoration in Chapter 9, section H.2., Restoration.

The Comptroller General has recognized that the Miscellaneous Receipts statute does not apply to trust funds. 60 Comp. Gen. 15, 26 (1980); 27 Comp. Gen. 641 (1948). See discussion in Chapter 6 at section E.2h. The Miscellaneous Receipts statute directs that all moneys received for the use of the United States must be deposited in the general fund of the Treasury. 31 U.S.C. § 3302(b). The very terms of the statute call into question its application to moneys the government receives in trust. As a practical matter, in most instances, it is clear when the United States has received funds for its use. Occasionally a question does arise whether the funds are for credit to the general fund of the Treasury as a miscellaneous receipt or to a trust account. In 25 Comp. Gen. 637 (1946), we concluded that payments made in conjunction with making movies in national parks were payments made in consideration of the privilege to film in the park and, hence, were properly accounted for as miscellaneous receipts, not donations to the National Park Trust Fund. On the other hand, in B-195492, March 18, 1980, we found no elements of an exchange and accordingly held that payments by nonprofit associations operating in national parks of one-half of one percent of their gross sales were properly treated as contributions to the Cooperating Associations Trust Fund, not as miscellaneous receipts.

In 60 Comp. Gen. 15 (1980) the Comptroller General expanded on the concept of "received in trust." The Department of Energy had received $25 million under the terms of a consent order settling disputes between Energy and the Getty Oil Company concerning compliance with oil price and allocation regulations. The order provided that Getty would deposit $25 million into a bank escrow account. The order did not specify how the money was to be distributed. Energy announced that the money would be distributed to state governments in proportion to the oil company's sales in that state and directed that the states use the money to defray the heating oil costs of low-income persons. GAO found that, to the extent the money would be returned as restitution to victims of Getty's alleged violation of oil and price allocation regulations, Energy was acting as a trustee and the funds need not be deposited to the Treasury as miscellaneous receipts. However, to the extent that Energy sought to distribute funds to a class of individuals other than to those overcharged, those funds were not held in trust and must be deposited in the Treasury as miscellaneous receipts. (This opinion was the first of several to address this matter. See 62 Comp.

Gen. 379 (1983); B-200170, April 1, 1981; 63 Comp. Gen. 189 (1984); B-210176, October 4, 1984.)

For other cases treating amounts received as trust funds exempt from the Miscellaneous Receipts statute, see 51 Comp. Gen. 506 (1972) (National Zoo receipts are for deposit to the credit of the Smithsonian Institution, not as miscellaneous receipts, even though activities in question were supported mostly by appropriated funds because the Zoo operates under a trust charter); B-192035, August 25, 1978 (income derived from local currency trust fund operations not for deposit as miscellaneous receipts since Agency for International Development is merely a trustee of host country funds); B-166059, July 10, 1969 (recovery for damage to property purchased with trust funds credited to trust fund account); B-4906, October 11, 1951 (recoveries for lost or damaged property financed from Federal Old-Age and Survivors Insurance Trust Fund are creditable to the trust fund).

One decision applying “time” concepts to a statutory trust fund reached a predictable result. In B-171277, April 2, 1971, amounts in the trust fund, which consisted of fees received from commercial testing labs for testing agricultural products, were available until expended. The “available until expended” language made the trust fund a no-year appropriation and thus available for multi-year contracts. So long as the fund contained amounts sufficient to cover all obligations under the contract, there would be no Antideficiency Act concerns. See Chapter 5 for a general discussion of no-year funds and multi-year contracts.

5. Duty to Invest

Under the common law, it is the trustee’s duty to make the trust corpus productive. Restatement (Third) of Trusts, § 181 (1990). Obviously the issue is of more than passing importance to the trust beneficiaries. For amounts held in trust by the United States, the trustee’s duty to make the trust corpus productive, and the trustee’s corresponding liability to the beneficiary for failure to do so, are limited by the concept of sovereign immunity. As a general rule, the United States is not liable for interest unless it has consented to the payment of interest. Library of Congress v. Shaw, 478 U.S. 310, 314-17 (1986); United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951). The Supreme Court has insisted that any such consent be express and clear:

"[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms." United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947).

See also B-272979, August 23, 1996, 65 Comp. Gen. 533,539-40 (1986) (no difference whether interest is characterized as "damages, loss, earned increment, just compensation, discount, offset, penalty or any other term"); and B-241592.3, December 13, 1991 (no authority to pay interest on funds held by Customs on behalf of the Virgin Islands, absent an agreement or statute).

Various arguments have been made that 31 U.S.C. § 9702 provides the requisite authority to pay interest on trust funds. Section 9702 provides that "Except as required by a treaty of the United States, amounts held in trust by the United States Government (including annual interest earned on the amounts)—(1) shall be invested in Government obligations; and (2) shall earn interest at an annual rate of at least 5 percent." This statute was intended to end the practice of investing United States trust funds in state obligations. Despite its seemingly straightforward language, this statute applies only where a statute, treaty, or contract requires trust funds to be invested. It is not an independent authorization for the payment of interest. B-241592.3, December 13, 1991.

A comprehensive discussion of 31 U.S.C. § 9702 is contained in United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1324 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976) and the cases cited therein. In Mescalero, the Court of Claims explained the purpose of the Act of September 11, 1841, ch. 25, sec. 2, 5 Stat. 465, now codified at 31 U.S.C. § 9702. Congress wanted to prohibit the investment of United States trust funds, otherwise required by treaty or statute to be invested, in state bonds and to require instead their investment in safer United States securities. The court held that the 1841 act did not require the payment by the United States of interest on any fund that was not expressly required to be invested by a contract, treaty, or a statute. The lesson of Mescalero and subsequent cases is that one must examine the statute or other legal source for the fund to determine whether any requirement to invest the trust fund exists. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951) (interest on amount of compensation awarded for taking of original Indian title by United States in 1855 not allowed where jurisdictional act contained no provision authorizing award of interest);

B-226801-O.M., May 4, 1988 (section 9702 did not require the Veteran's Administration to invest the Post-Vietnam Era Veterans Education Account, listed as a trust fund at 31 U.S.C. § 1321(a)(82)). See also the general discussion of the No-Interest Rule in chapter 12 above.

An example of a specific requirement for investment and the payment of interest is found at 25 U.S.C. § 161a. It requires that all funds held in trust by the United States to the credit of Indian tribes or individual Indians be invested by the Secretary of the Treasury, with interest at rates determined by the Secretary of the Treasury. GAO has considered the payment of interest on government held Indian funds numerous times. E.g., 52 Comp. Gen. 248 (1972); 8 Comp. Gen. 625 (1929); B-272979, August 23, 1996; B-243029, March 25, 1991; B-108439, December 28, 1973; B-126459, February 20, 1956. The obligation to invest under section 161a does not arise prior to the date that Congress has specified for deposit of funds to the trust. B-108439, April 13, 1978.

6. Liability for Loss of Trust Funds

Where the government acts in the capacity of a trustee with respect to a fund it holds, the government must see to the proper application of the trust funds like a private trustee. Julia A. L. Burnell v. United States, 44 Ct. Cl. 535 (1909). In the cited case, the Treasury paid the wrong party through a mistake of law. The Claims Court held that the government remained responsible to the rightful owner of the securities. Id.

The decisions of the Comptroller General are to the same effect. For example, the Department of Veterans Affairs holds "personal funds of patients" for safekeeping and use during their stay at VA hospitals. The government is accountable to the patients for these funds like a private trustee would be.[271] 68 Comp. Gen. 600, 603 (1989). Accordingly, where an erroneous payment is made, the government is chargeable with any loss resulting from the breach of trust. In this case, VA was advised to make the trust fund whole by charging the deficiency to the VA's operating appropriation as a necessary expense of administering the "trust." Id. To the same

[271]Cf. B-153479, April 15, 1964 (prisoners'" trust funds).

effect is 67 Comp. Gen. 342 (1988) (use of Bureau of Indian Affairs operating appropriation to adjust deficiency in BIA trust fund).

The liability of an accountable officer for loss of funds in a trust account is no different than any other loss of government funds. Although the funds are not strictly speaking public funds, they are nevertheless funds for which the government is accountable. The absence of a beneficial interest in the funds does not alter the liability equation; by accepting custody of them, the United States assumes a trust responsibility for their care and safekeeping. B-200108, B-198558, January 23, 1981. If a trustee commits a breach of trust, the trustee is chargeable with any loss resulting from that breach. B-248715, January 13, 1993. See generally United States v. Mitchell, 463 U.S. 206, 226 (1983); Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. United States, 175 Ct. Cl. 451 (1966) (misuse of trust funds is a breach of trust, not Fifth Amendment taking). The responsibility of the accountable officer has been described as follows:

> "[T]he same relationship between an accountable officer and the United States is required with respect to trust funds of a private character obtained and held for some particular purpose sanctioned by law as is required with respect to public funds." 6 Comp. Gen. 515, 517 (1927) (funds in retirement account of embezzling employee used to satisfy loss of private trust funds).

See also, Osborn v. United States, 91 U.S. 474 (1875) (court can summarily compel restitution of funds improperly withdrawn from registry account by former officers).

Other situations involving accountability for funds held in trust or trust-like circumstances include:

- VA patient funds: 68 Comp. Gen. 371 (1989); B-226911, October 19, 1987; B-221447, April 2, 1986; B-215477, November 5, 1984; B-208888, September 28, 1984.
- Erroneous payment to Individual Indian Money Account: 65 Comp. Gen. 533 (1986).
- Registry accounts of courts of the United States: 64 Comp. Gen. 535 (1985); 63 Comp. Gen. 489, 490 n.1 (1983); B-198558, B-200108, January 23, 1981.
- United States Naval Academy laundry fund: 17 Comp. Gen. 786 (1938)

- Prisoners' money held in Brig Officer's Safekeeping Fund: B-248715, January 13, 1993;
- Mutilated and worn currency sent by private bank to Treasury for redemption: B-239955, June 18, 1991;
- Overseas Consular Service Trust Fund holding private funds to pay for funeral expenses: B-238955, April 3, 1991;
- Foreign currencies accepted in connection with accommodation exchanges: B-190205, November 14, 1977.

7. Claims

a. Setoff and Levy against Trust Funds

In 38 Comp. Gen. 23 (1958), GAO held that a delinquent taxpayer's postal savings deposits are property subject to IRS levy and the fact that the postmaster held the deposits as a trust fund does not protect them from levy. Similarly, in B-165138, March 12, 1969, we advised the Bureau of Prisons that prisoners' funds it held as "trust funds" under 31 U.S.C. § 1321, are property subject to tax lien and levy under sections 6321 and 6331, respectively, of the Internal Revenue Code of 1954. The literal language of section 6334(c) of the IRC compelled this result. That section provides that no property rights would be exempt from levy unless specifically exempted in section 6334(a). See also 63 Comp. Gen. 498 (1984) (honoring a levy against a judgment award did not give rise to a breach of trust); 34 Comp. Gen. 152 (1954) (government may take setoff against funds held by it in trust to recoup a debt owed to the government as sovereign).

Contrast the preceding decisions (involving the collection of taxes from trust funds held by the government) with 48 Comp. Gen. 249 (1968) (reversing B-72968, April 21, 1948), where the Comptroller General held that the Bureau of Prisons could not set off prisoners' trust funds to satisfy claims of the United States arising from an inmate's destruction of government property. In reversing his earlier decision, the Comptroller General pointed out that he had not known at the time of his 1948 decision that the terms of the trust expressly required the prisoner's consent prior to a withdrawal of funds. Accordingly, given the new information, the Comptroller General held that absent a change in the terms of the trust agreement, the Bureau could not use prisoner trust funds to satisfy a writ of execution issued pursuant to a court judgment against the inmate. Id. Cf. 65 Comp. Gen. 533 (1986) (strict moral obligations of

United States in dealing with Indians require United States to absorb the loss for moneys erroneously paid from an Individual Indian Money account and forego collection from the erroneous payee—another Indian).

b. Unclaimed Moneys

At the end of each fiscal year, money which has been in any of the trust accounts identified in or established pursuant to 31 U.S.C. § 1321 for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Subsection 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account. Instructions to implement 31 U.S.C. § 1322 are contained in the Treasury Financial Manual, 1 T.F.M. 6-3000. (See also, Chapter 12, above, Section J, Unclaimed Money/Property.)

Under 31 U.S.C. § 3702(b), a claim against the government ordinarily cannot be considered unless the claim is received within 6 years of the date it accrues. The Comptroller General has held that the 6-year statute of limitations in 31 U.S.C. § 3702 (b) does not bar claims to recover moneys held in trust. See B-201669, November 26, 1985 and decisions cited therein. Since the trustee holds property for the beneficiary's benefit, unless there is a breach of some duty owed by the trustee to a beneficiary, such as a repudiation of the trust, there is no claim or cause of action that would trigger the running of the statute. Id. See Bogert, Trusts and Trustees, 951 (2nd Ed. 1983). In keeping with the general rule, GAO has deemed the statute inapplicable to claims of beneficiaries payable from money held in trust. See 70 Comp. Gen. 612 (1991); 66 Comp. Gen. 40 (1986); 55 Comp. Gen. 1234 (1976); B-201669, November 26, 1985; B-155963, March 19, 1965 (special deposit account for the proceeds of withheld foreign checks); B-139963, July 6, 1959 (soldiers' deposit savings accounts); and B-103575, August 27, 1951 (unclaimed moneys of individuals whose whereabouts are unknown).

The agency that received and transferred the funds to the Treasury handles any claims relating to those funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to the trust account, payment is made directly from that account. See Unclaimed Money: Proposals for

Transferring Unclaimed Funds to States, GAO/AFMD-89-44, at 10 (May 1989).

8. Federal Trust Funds and the Budget

As suggested earlier, many of the federal trust funds are bookkeeping devices to capture receipts earmarked for certain programs or purposes. They do not hold cash separate from the Treasury—all moneys received by the Treasury are commingled and used to pay government obligations as they come due. In effect, Treasury borrows the earmarked receipts in exchange for interest-bearing, nonmarketable Treasury securities. As a result, a trust fund balance reflects federal debt, i.e., debt held by a government account.[272] To the extent that the receipts credited to a trust fund (that is, fees, employee contributions, tax receipts and interest earned on Treasury securities) exceed expenditures charged to the fund, the trust fund balance grows. The converse, of course, is also true—to the extent that expenditures exceed receipts, the balance decreases.

The Social Security trust funds are the largest federal trust funds both in terms of annual spending and account balance. They are also the largest single item in the federal budget. See, Social Security Financing, GAO/AIMD/HEHS-98-74, at 29 (April 1998). Congress created the Social Security program in 1935 in response to the economic deprivations of the Depression. Originally created as a benefit system for retired workers, over time, Congress has expanded Social Security to insure disabled workers and the families of retired, disabled, and deceased workers. Social Security: Different Approaches for Addressing Program Solvency, GAO/HEHS-98-33, at 4 (July 1998).

Social Security consists of two separate trust funds, the Federal Old-Age and Survivors Insurance Trust Fund which covers retirement and survivor benefits and the Federal Disability Insurance Trust Fund which provides benefits to disabled workers and their families. Congress has provided a permanent indefinite

[272]Debt held by the government, about $1.8 trillion at the end of 1998, primarily reflects debt owned by federal trust funds, such as the Social Security trust funds. Federal Debt: Answers to Frequently Asked Questions—An Update, GAO/AIMD-99-87, at 5 (May 1999).

appropriation from the general fund of the Treasury to the Trust Funds of an amount determined by applying the applicable employment tax rate to wages reported to the Secretary of Treasury or his delegate. 42 U.S.C. §401(a)(3). As a check on the amount credited to the Trust Funds, the Commissioner of Social Security is to certify the amount of wages (or self- employment income) reported to IRS. Id. See B-261522, September 29, 1995 (Social Security Administration may use wage data collected by IRS in certifying to Treasury the amount of wages reported by employers and the amount of funds appropriated to the Social Security trust funds).

A Board of Trustees holds the Social Security Trust Funds. 42 U.S.C. § 401(c). The Board of Trustees is composed of the Secretary of the Treasury as Managing Trustee, the Commissioner of Social Security, the Secretary of Labor, the Secretary of Health and Human Services, all ex officio, and two members of the public nominated by the President and confirmed by the Senate. Id. In addition to holding the fund, it is the duty of the Board of Trustees to report to the Congress on the operation and status of the Funds and to review and recommend improvements in the administrative procedures and policies followed in managing the Funds. Id. A "person serving on the Board of Trustees" does not have a fiduciary duty vis-à-vis the Trust Funds and "shall not be personally liable for actions taken [as a member of the Board of Trustees] with respect to the Trust Funds." Id.

There are a number of large trust funds that finance public works, notably transportation, programs. A prominent example is the Federal Aid Highway Program which distributes billions of dollars of federal funding annually to the 50 states, the District of Columbia, and Puerto Rico for highway construction, repair, and related activities. To finance the highway program, Congress established the Highway Trust Fund account in the Treasury, 26 U.S.C. § 9503 (a) (1994), designating the Secretary of Treasury as trustee, 26 U.S.C. § 9602(a).[273] Congress has provided the fund with a permanent indefinite appropriation of amounts received in the Treasury from

[273]The Highway Trust Fund actually contains two accounts. The oldest and most well-known of the two accounts is the highway account. The other, more recent account is the Mass Transit Account. 26 U.S.C. § 9503(e).

certain gasoline, diesel fuel, and other excise taxes paid by highway users. 26 U.S.C. § 9503(b). (In fiscal year 1996, these earmarked revenues brought in $24.7 billion to the fund. Dept. of Transportation, Highway Trust Fund Primer (January 1999).) The Secretary of the Treasury is responsible for holding the Trust Fund, reporting annually to Congress on the financial condition and operation of the Fund, and investing any amounts in the Fund not needed to meet current needs in interest-bearing Treasury securities. 26 U.S.C. § 9602. See B-275490, December 5, 1996 (Treasury, as trustee, could credit Highway Trust Fund income statements with $1.59 billion in excise taxes mistakenly not credited to the Fund as the result of accounting and reporting errors).[274]

Chapter 98 of title 26, United State Code, contains a number of other trust funds established to finance social insurance, public works or environmental programs. For example, the Black Lung Disability Trust Fund finances the payment of benefits to eligible miners under the Black Lung Benefits Act. 26 U.S.C. § 9501. Another social insurance fund is the Vaccine Injury Compensation Trust Fund, 26 U.S.C. § 9510. In addition to the Highway Trust Fund, other public works trust funds include the Airport and Airway Trust Fund, 26 U.S.C. § 9502, the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505, and the Inland Waterways Trust Fund, 26 U.S.C. § 9506. Examples of trust funds designed to finance environmental remediation programs are the Hazardous Substance Superfund, 26 U.S.C. § 9507, and the Leaking Underground Storage Tank Trust Fund, 26 U.S.C. § 9508.

There has been an ongoing debate over whether the trust funds, particularly Social Security and the large infrastructure trust funds such as the Federal Highway Trust Fund and the Airport and Airways Development Trust Fund should be included in the budget.

[274]For more information on the history and operation of the Highway Trust Fund, see CRS, Federal Excise Taxes on Gasoline and the Highway Trust Fund: A Short History, No. 96-394 (May 3, 1996); Highway Trust Fund: Condition and Outlook for the Highway Account, GAO/RCED-89-136 (May 1989); Highway Trust Fund: Revenue Sources, Uses, and Spending Controls, GAO/RCED-92-48FS (October 1991); Highway Trust Fund: Strategies for Safeguarding Highway Financing, GAO/RCED-92-245 (September 1992); and Transportation Trust Funds, GAO/AIMD-95-95R (March 1995).

In other words, whether they should be “off budget.”[275] Since fiscal year 1969 the President has submitted a unified budget that covers both trust and non-trust fund activities. The unified budget merges trust and non-trust outlays and receipts into a consolidated budget surplus or deficit. As a result, the growing positive trust fund balances, particularly in the Social Security trust funds, “[mask] the basic imbalance in the government’s financial affairs.” Statement of Charles A. Bowsher, Comptroller General of the United States, The Budget Treatment of Trust Funds, GAO/T-AFMD-90-3, at 5, before the Subcommittee on Legislation and National Security, Committee on Government Operations, House of Representatives (October 1989) (hereafter Bowsher Testimony). In other words, the trust fund surpluses disguise the severity of the deficit (or the amount of surplus) on the non-trust fund side of the government’s ledgers.

Related to the on or off budget issue are allegations of misuse of the major trust funds such as the Highway and the Airport and Airway trust funds. Proponents of this view charge that, while the trust funds have a steady dedicated stream of tax receipts, budgeting actions have restricted fund outlays to create trust fund surpluses for budgetary reasons, namely, to lower the deficit. Budget Issues: Trust Funds and their Relationship to the Federal Budget, GAO/AFMD 88-55, at 4, (September 30, 1988). This practice, proponents argue, breaks the implied agreement underlying the original enactment of the “trust fund”—full use of dedicated tax receipts for the trust fund program. This simply highlights the tension that Congress faces between the collection and expenditure of earmarked revenues, whether trust funds or special funds, and the tradeoffs Congress must make with respect to spending priorities in general. Budget Issues: Trust Funds in the Budget, GAO/T-AIMD-99-110, at 1 (March 9, 1999).

[275] A loose definition of “off budget” is the exclusion of receipts and disbursements from consideration as part of the budget. A better sense of what it means to be “off budget” can be gleaned from the statutory provision prescribing the budgetary treatment of the Postal Service Fund. 39 U.S.C. § 2009a. Section 2009a directs that the receipts and disbursements of the Postal Service Fund shall be excluded from the budget totals, exempt from any statutory budget limitations, and exempt from sequestration orders under the Balanced Budget and Emergency Deficit Control Act of 1985. For additional discussion, see the CRS reports, Transportation Trust Funds: Budgetary Treatment, No. 98-63 (April 1998) and Social Security and the Federal Budget: What Does Social Security’s Being “Off Budget” Mean?, No. 98-422 (October 15, 1998).

A number of different approaches have been offered to solve the "problem." One proposed solution is to insulate a trust fund from the normal budgetary pressures by taking the fund "off budget." See, e.g., H.R. 798, 106th Cong., § 7 (1999), (a bill to provide funding and off-budget treatment for the protection and enhancement of natural and cultural resources); H.R. 4, 105th Cong., § 2 (1997) (a bill proposing to provide off-budget treatment for the Highway, Airport and Airway, Inland Waterways and Harbor Maintenance Trust Funds). GAO has suggested that Congress could address the matter in the context of the unified budget by separately displaying trust funds, federal funds and government sponsored enterprises in the budget. Bowsher Testimony, supra. In the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998), Congress took yet a different approach with respect to the highway and mass transit programs. In TEA-21 Congress established outlay caps that apply separately to the highway and mass transit programs for fiscal years 1999 through 2003. In addition to carving out outlay caps for these programs separate from the dollar caps applicable to discretionary spending in general, Congress also specified annual guaranteed minimum spending levels tied, in the case of highways, to Highway Trust Fund receipts. For a discussion of the implications of this approach, see Statement of Susan J. Irving, Associate Director, Budget Issues, AIMD, Cap Structure and Guaranteed Funding, GAO/T-AIMD-99-210, before the Committee on Rules, House of Representatives (July 1999).